

OVERSIGHT ON MANAGEMENT ISSUES AT THE NATIONAL MARINE FISHERIES SERVICES

HEARING BEFORE THE SUBCOMMITTEE ON OCEANS, ATMOSPHERE, AND FISHERIES OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE ONE HUNDRED SEVENTH CONGRESS SECOND SESSION

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ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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OVERSIGHT ON MANAGEMENT ISSUES AT THE NATIONAL MARINE FISHERIES SERVICES

THURSDAY, MAY 9, 2002

U.S. SENATE,
SUBCOMMITTEE ON OCEANS, ATMOSPHERE, AND FISHERIES,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:33 a.m. in room SR-253, Russell Senate Office Building, Hon. John F. Kerry, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

Senator KERRY. Good morning. The Subcommittee on Oceans, Atmosphere, and Fisheries has already come to order, so we thank you. I want to welcome our witnesses and everybody here, for what I consider to be an extraordinarily important hearing and, I hope, a demarcation point for a rapid reevaluation of fisheries management in response to the crisis of our fisheries today.

This morning, I called Secretary Evans just to chat a little about where we find ourselves. I wanted to give him a heads-up about the Committee's concerns on this issue. Unfortunately, between terrorism, homeland security, what's happening in the Middle East, health care and a lot of other issues, the word "crisis" gets obscured to a lot of Americans, and people don't have room for more crises. But, that is literally what we have in our fisheries, not just in this country, but globally, and it's a serious problem. It's a renewable resource which is under enormous stress and has been for a long time.

I'm joined by my colleague, Senator Breaux, who has served almost as—I guess we've served about the same amount of time on this Committee, and that's now a long time, having been in the Senate for 18 years. There are a couple of other Senators present—Senator Stevens, Senator Hollings, Senator Inouye—all of whom have long experience with this issue and some of whom were here when Magnuson was first put together. I think I've been part of the rewrite of the Magnuson Act, three times, four times now, and it is getting increasingly frustrating, because fisheries resources are increasingly in jeopardy.

I remain convinced that, to some measure that we must proceed. We tried in the context of the Farm Bill, where we got a small authorization for a New England buyout, but it's my intention to try to continue to deal with the overcapacity issue, which is at the heart of the problem in certain fisheries. There is too much money

chasing too few fish. That's been true before, and it's true today. The whole effort of this Committee has been to try to provide those who manage with a structure that will empower them to be able to manage effectively and efficiently, taking into account the needs of our communities, the needs of our fishermen, and obviously, the needs of the system itself.

We had a chart put together of the fishery management process after talking with people about what they go through. Between the Magnuson-Stevens Act fishery management process, the regulatory process, the ESA formal consultation, NEPA and CZMA, all of which have to kind of join together simultaneously to come out with the same outcome, it's a complicated, bureaucratic maze. But it's there because we wanted this to be a democratic process. The initial effort was to honor the right of those people most involved—fishermen, the local communities, those responsible—to be able to make the choices. That was the intended structure of the councils all around our country, that each council had the proper representatives to respond to its own needs.

Today we're convening this hearing to really look at the root causes of what has come to be seen as a national crisis. Many of you know that legal challenges to federal fishery management plans have been filed on every coast and have affected fisheries in the home states of many of our members. Most recently, a federal district judge ruled that Framework 33 to the New England Ground Fishery Management Plan failed to comply with the law and has ordered NMFS to implement strict interim management measures for the fishery, many of which are going to have severe economic consequences for our fishing communities.

We knew the transition to the sustainable fisheries was not going to be an easy one, but a troubling picture is now emerging of a management system in deep crisis. This new crisis is not the disaster that we faced in New England in the late 1980's when cod stocks were plummeting. On the contrary, scientific information shows that we're climbing out of that challenge with some stocks at levels not seen in over 20 years. But I would remind people, it took a lot of abstinence, a lot of nonfishing, and a lot of restraint to make that happen.

The new management crisis is actually harder to graph or measure, but its existence is real, and the conflict is deeply affecting everyone in the system—most directly, the fishermen. The combination of multiple statutory mandates, complicated regulatory procedures and resource limitations, notwithstanding the \$11 million that we succeeded in getting, as an emergency input, which I told Secretary Evans this morning is simply not enough, has made it almost impossible for managers or fishermen to respond quickly, flexibly or appropriately in order to address the management problem.

In addition, the implementation of the Sustainable Fisheries Act has been plagued by conflict, delays, and inconsistent interpretations of what we intended in 1996.

We need to make this management system work. The downside of a judicially drafted management plan was driven home pointedly in the New England case in recent days. Given the possibility that the judge could have closed the fishery altogether, we initially were

relieved that she adopted the agreement that was negotiated among NMFS, the affected states, the Conservation Law Foundation and most of the fishery interveners. These groups recognized that the fishery was out of compliance and made hard choices and brought forward a plan for the 2002 fishing season that would improve conservation performance without devastating the industry.

But the judge's order also contained additional interim measures that threw off the delicate balance that the democratic process had tried to produce, prompting the party that filed the lawsuit in the first place, the Conservation Law Foundation, to ask the court to reconsider.

I support the call for reconsideration and I thank the Conservation Law Foundation for demonstrating a commitment to both restoring the fishery and sustaining our fishing communities, which is the heart of the Sustainable Fisheries Act. But I don't want to suggest that I'm inviting further conflict or that I'm inviting further delay. There's a delicate balance there. I am simply suggesting that many people feel that the interim measures that went beyond the original agreement were based on an averaging that is simply not realistic with respect to some of those who haven't fished and some of those who have.

Frankly, these types of hard choices should never have had to have been made in court. Court, as we know, allows less room for flexibility and discussion. The fact is, the fishery is in disarray now. There are protests in our ports, and we're left asking how do we help our communities get through this season? How do we restore confidence in the fishery management process? And how are we going to prevent this from happening again?

This same scenario has either played out, or is going to play out, in coastal communities all around the country. We need to work together to develop approaches within the agency, within the councils, here in Congress and through the National Ocean Commission in order to make this system work. A number of recent management reviews, of which many of our panelists today were involved, indicate that the combination of an unwieldy regulatory process, limited resources for data acquisition and analysis, poor management practices, and a litigation-burdened staff, which cannot be underestimated in its impact, have precipitated this situation.

NMFS and the fisheries management councils have been the subject of widespread criticism and an increasing number of lawsuits. As of May 1, 2002, there were 104 open docket cases against the agency. Some call the lawsuits themselves a crisis. They've certainly placed an incredible burden on the system, the managers, and the fisheries. But the lawsuits have also illuminated problems. And with this knowledge, my hope is we can go about fixing them, and I hope soon.

That's why we called you here today. Each of you has substantial knowledge of the current fishery management system we're working on and of how we might fix the problems. Obviously, Congress writes the law and we take responsibility for ways in which that law may, in itself, create confusion. But in the end, the implementation and the execution of the law are in the executive branch. The requirement to provide the money and to certainly ask for the

money is there, as well as the decision of what it's going to take to do this properly.

Dr. Hogarth, I believe, is making a superhuman effort to get these things done and to do it sensibly. But I think the agency is struggling with how to do this. We're all in this together. This not a finger-pointing session. This is a way to try to find a solution. We need to hear from each of you as to how we can put together a plan that's going to solve some of these tough issues.

The SFA was not supposed to be a paper exercise. It's supposed to result in better management, better decisions to benefit real people. We thought that successful management could involve measurable increases in biomass, smarter management, modern techniques, and increase the opportunities for our coastal communities. But, frankly, the funding has never matched the job that we are requiring people to do, and now we're playing catch-up.

More disturbing, there really appears to be confusion about what constitutes successful fisheries management and disagreement about how to measure and monitor our progress. I think that portrays a fundamental lack of trust in both the system and among the constituencies.

Finally, the system really needs focused resources and smart, efficient processes. NOAA Fisheries is the fourth-largest regulator in the Federal Government, yet the agency doesn't have nearly the resources that its counterparts receive. It has to have trained staff and coordinated procedures that are going to help to effectively meet the mandates of a suite of laws—the Magnuson-Stevens Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, the Regulatory Flexibility Act, and reams of executive orders and agency guidance. So we've got to have a coordinated plan among the agency, the councils, and Congress in order deliver a smart, modern management system. That means we need a national plan with adequate resources and we must reduce fishing capacity nationwide. Without that plan, I don't see how we're going to make this successful. We have to be realistic about how long it's going to take to put it in place.

We have a list of endangered species growing from 14 species in 1973 to 47 in 1999, yet little progress has been made to improve protected species management, except where litigation has targeted those resources, such as the case of the Stellar sea lions or the North Atlantic right whales. The lack of preparation places not only protected resources, but also a number of activities, including fishing itself, in potential jeopardy. That means we've got to improve our scientific understanding, which Senators have on this panel have talked about year after year for the last 5 or 6 years. Every time we agree that the lack of science is a problem in being able to make good decisions, and yet we don't get the capacity to get the science.

I know this system is burdensome, it's expensive. I apologize for taking a little longer than I might, as Chairman, to lay this out, but this is critical. We have got to come to grips with how we're going to do this, and we've got to design something with all three critical components of sustainable use adequately addressed—conservation, number one, societal needs, and economic impacts. I hope that we're going to succeed. I thank all of you for coming here

today to be part of it, and I thank my colleagues for their indulgence.

[The prepared statement of Senator Kerry follows:]

PREPARED STATEMENT OF HON. JOHN F. KERRY,
U.S. SENATOR FROM MASSACHUSETTS

Good morning. Today, the Subcommittee on Oceans Atmosphere and Fisheries is holding an oversight hearing on the current state of fishery and protected resource management in the United States. We have convened this hearing to get to the root causes of what has come to be seen as a national crisis. This has hit close to home for many of us. As many of you know, legal challenges to federal fishery management plans have been filed on every coast and have affected fisheries in the home states of many of our members. Most recently, a federal district judge ruled that Framework 33 to the New England groundfish fishery management plan failed to comply with the law, and has ordered NMFS to implement strict interim management measures for the fishery, many of which are going to have severe economic consequences for our fishing communities.

We knew the transition to sustainable fisheries would not be an easy one, but a troubling picture is now emerging of a management system in deep crisis. This new crisis is not the disaster we faced in New England in the late 1980s, when cod stocks were plummeting. On the contrary, scientific information shows that we are climbing out of that pit—with some stocks at levels not seen in over 20 years. This new management crisis is harder to graph or measure—but its existence is real and the conflict is deeply affecting everyone in the system, most directly the fishermen. The combination of multiple statutory mandates, complicated regulatory procedures, and resource limitations have made it almost impossible for managers—or fishermen—to respond quickly, flexibly, or appropriately to address a management problem. In addition, implementation of the Sustainable Fisheries Act has been plagued by conflict, delays and inconsistent interpretations of what we enacted in 1996.

We need to make our management system work. The downside of judicially-drafted management plans was driven home in the New England case. Given the possibility that the Judge could have closed the fishery, we were initially relieved that she adopted the agreement negotiated among NMFS, the affected states, the Conservation Law Foundation, and most of the fishery intervenors. These groups recognized that the fishery was out of compliance, made hard choices, and brought forward an plan for the 2002 fishing season that would improve conservation performance without devastating the industry. However, the Judge's order also contained additional interim measures that threw off this delicate balance, prompting the party that filed the lawsuit in the first place—Conservation Law Foundation—to ask the Court to reconsider. While endless litigation should not be encouraged, I do support this call for reconsideration. The Conservation Law Foundation and others involved in the negotiated agreement demonstrated a commitment to both restoring the fishery and sustaining our fishing communities—the heart of the Sustainable Fisheries Act.

These types of hard choices should have not have been made in court, where there is little room for discussion and flexibility. Now the fishery is in disarray, there are protests in our ports, and we are left asking—*how can we help our communities get through this season, how do we restore confidence in the fishery management process, and, how will we prevent this from happening again?* This same scenario has played out—or will play out—in coastal communities around the country. We need to work together to develop approaches within the agency, within the councils, here in Congress, and through the National Ocean Commission to make this system WORK.

A number of recent management reviews, of which many of our panelists today were involved, indicate that the combination of an unwieldy regulatory process, limited resources for data acquisition and analysis, poor management practices, and a litigation-burdened staff has precipitated the situation. NMFS and the Fisheries Management Councils have been the subject of widespread criticism and an increasing number of lawsuits. As of May 1, 2002, there were 104 open docket cases against the agency. Some call the lawsuits themselves a crisis, and they have certainly placed an incredible burden on the system, the managers, and the fisheries. But the lawsuits also have illuminated problems, and with this knowledge, perhaps we can go about fixing them.

This is why we have called you all here today. Each of you has substantial and intimate knowledge of the system and are working on diagnosing or fixing problems with the current fishery management system.

No one of us can make this system really function well alone—even Dr. Hogarth, who is making a super-human effort to get things done sensibly and right. The SFA was *not* supposed to be a paper exercise—it was supposed to result in better management, better decisions, to benefit real people. We thought successful management would involve measurable increases in biomass, smarter management, modern techniques, and increasing opportunities for our coastal communities. But funding was not matched to the job at hand, and we are now playing catch-up. More disturbing, there appears to be confusion about what constitutes “successful” fisheries management results, and disagreement about how to measure and monitor our progress. I think that betrays a fundamental lack of trust in both the system and among the constituencies. We have to repair that.

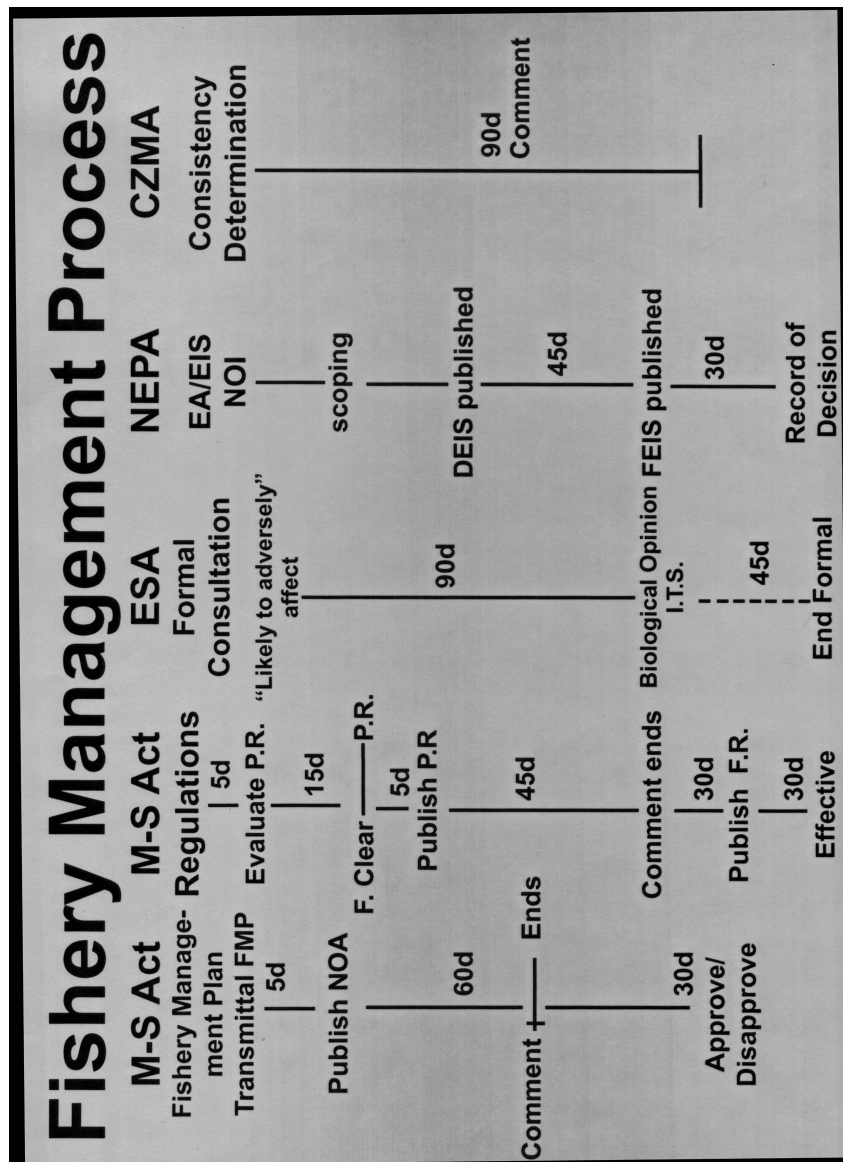
This system needs focused resources and smart, efficient processes, because the burden is enormous, and the funding is not plentiful. NOAA Fisheries is the fourth largest regulator in the Federal Government, yet the agency does not have nearly the resources that its counterparts receive. NMFS has got to have the trained staff and coordinated procedures that will help them effectively and efficiently meet mandates under a suite of laws—including the Magnuson-Stevens Act, the Marine Mammal Protection Act, the Endangered Species Act, the National Environmental Policy Act, and the Regulatory Flexibility Act—and reams of executive orders and agency guidance.

We also need a coordinated plan among the agency, the Councils, and the Congress to deliver a smart, modern and responsive management system to our constituents. This *must* include a *national plan and adequate resources to reduce capacity nationwide*. We simply have too many participants to manage effectively. Without a plan, the drain on the system cannot be overcome. We must be realistic about how long it will take to accomplish this, but we should not countenance unnecessary delay. When we passed the SFA, we asked our fishermen to abide by rebuilding targets and timetables. It is time for us to map out a framework and schedule for getting our *own* management house in order, so that we can restore confidence that the management system will provide long-term benefits to the fisheries.

Protected resource issues are also an issue. Despite listed endangered species growing from 14 species 1973 to 47 in 1999, little progress has been made to improve protected species management, except where litigation has targeted resources—such as in the case of Steller sea lions and North Atlantic Right Whales. This lack of preparation places not only protected resources, but also a number of activities, including fishing, in potential jeopardy. This means we must not only improve our scientific understanding of these species, and the ecosystems in which they all live, but we must also ensure we coordinate our fisheries management with ESA and MMPA obligations.

I know the regulatory system is burdensome and expensive, particularly if we manage all species individually. We should talk frankly about how we can design an integrated regional management system that will help reduce, not add to, this burden. Regional ecosystem planning will clearly help us meet our procedural and management goals. Such plans could revolve around existing Council areas of jurisdiction and would be designed to address all 3 critical components of sustainable use—(1) conservation; (2) societal needs; and (3) economic impacts. We can’t just do one at a time, as we do today. That means putting some good minds together, looking at all the tools at our disposal, and mapping out, step by step, how we can *simultaneously* address the social and economic consequences of a move to ecosystem management. We all need to be involved, and perhaps the Ocean Commission can help us.

I thank you all for coming here today to assist this Subcommittee to help put such a plan together, and I hope we can count on you to continue providing your advice and counsel. In view that we have two panels to hear from today, I would request that you limit your opening comments to five minutes. With that said, I look forward to your testimony before this Subcommittee today and I yield to the Ranking Member of this Subcommittee, Senator Snowe.



Senator Snowe?

**STATEMENT OF HON. OLYMPIA J. SNOWE,
U.S. SENATOR FROM MAINE**

Senator SNOWE. Thank you, Mr. Chairman. I certainly concur with the comprehensive presentation you've provided on behalf of the fishing industry community about the state that we're in today. I think this hearing is most appropriate and fortuitously comes at

a critical juncture, particularly in regards to the New England groundfish crisis.

As the Chairman indicated, we have fisheries management by litigation. It's something that I have consistently criticized over the years. We seem to be driven by litigation and judicial-based remedies and decisions. This is really a failure of the system at all levels. I think the New England groundfish industry is an illustration of the problems that we are facing today. The fishermen risk having their livelihoods eliminated as a result of the recent court-based decision and through no fault of their own.

I know Dr. Hogarth, you did yeoman's efforts in helping to negotiate the mediated settlement between all the parties. I regret that the judge did not abide by that agreement, but instead included overly restrictive allocations of days at seas and expanded closures. These additional measures are going to create a hardship for our fishermen. I appreciate the comments last week of Admiral Lautenbacher, who said that you're going to appeal the ruling. I hope that is the case, particularly in the event the motion to reconsider that was submitted to the judge does not succeed.

I hope the government will commit to filing an appeal on behalf of the industry, because this ruling represents devastating consequences for the groundfish industry in New England.

I hope this hearing will provide a framework for determining how we can best go about improving the fisheries management system, creating a cohesive system that ultimately brings stability and predictability to fisheries management, and breaking this endless cycle of perpetual litigation. Currently, NMFS is facing 104 lawsuits and we just learned that the Pacific groundfish industry is also facing litigation, and their livelihoods could potentially be affected by the outcome of any possible court decision.

Something has gone terribly wrong in our fisheries management and I hope today that we will be able to provide some recommendations that will visibly improve fisheries management. We need this to help us proceed in a much more orderly fashion that doesn't present the industry with jeopardizing consequences.

In the New England groundfish industry, for example, they had 5 days before the season began to learn what the regulations would be. Five days. No other industry in the country faces those hardships in trying to run their business.

I think that we have to determine what will best work in terms of restructuring the systems within the agency and make those decisions concerning the conflicting laws. I've read from the testimonies that are going to be presented here today that there are conflicts between NEPA and the Magnuson-Stevens Act. We have to determine what the conflicts are and what we can do to improve them. We also need to determine what can be done through executive decisions and what has to be done legislatively. We also have to create a timetable for action. I don't think it's going to be enough for us to discuss it and then not have a timetable for turning this around.

Fisheries management needs an overhaul of major proportions here. And without it, I don't think we're going to gain the confidence of those who are directly affected by these decisions. I think one way of breaking the cycle is by producing accurate and com-

prehensive stock assessments. We need to have the best science, and we need the best research. Without reliable data, no one's going to have any confidence in the decisions. Ultimately these decisions are going to result in litigation, because we have not provided the most up-to-date, timely and reliable data.

I hope this hearing represents a turning point in NMFS' direction and helps us plot the course that we need to take. I know under your leadership, Dr. Hogarth, that it will be done and I know you're doing it as we speak. I know you have expressed the hope that we could start over. I wish that we all had that luxury, but that's obviously not possible. The question is how best to proceed from here. I think this requires timely action on both your part and our part, to provide some remedies and relief for the industries that are directly affected. This is certainly the case with the New England groundfish industry.

Mr. Chairman, I thank you for holding this hearing today. I hope that as a result of this hearing we will improve the overall system and provide some stability to the decisionmaking process, thereby preventing future conflicts. Thank you.

[The prepared statement of Senator Snowe follows:]

PREPARED STATEMENT OF OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

I'd like to thank the Chair for scheduling this very important hearing on Fisheries Management.

I want to welcome you, Dr. Hogarth, and the rest of the witnesses to this critical hearing. This hearing needs to look at how to resolve the current crisis in New England and provide relief to the struggling industry. Our fisheries management system is in a state of utter disrepair and we are caught in an endless cycle of litigation-based management. The result of this litigation-based management cycle is poor fisheries management. And who directly suffers the consequences of poor management? The fishing industry, that's who.

This cycle starts with the Regional Fisheries Management Councils submitting fisheries management plans that are not in compliance with the law. In the past, NMFS has approved these plans knowing all the while that they are not in compliance. And time after time, the implementation of these plans leads to lawsuits. Making matters worse, when NMFS loses a lawsuit it is our fishermen that pay the price through such measures new fishing gear limitations, additional closed areas, and reduced days at sea.

Fishermen in Maine and throughout New England right now are facing the possibility of their livelihoods being eliminated by litigation. The New England Regional Fishery Management Council prepared Framework 33, which was based upon a fisheries management plan that predated the Sustainable Fisheries Act. NMFS approved the plan, even though there were legitimate questions about whether the plan was in compliance with the law, and then they were sued. The judge ruled against NMFS in December and started the process of determining a remedy—a remedy that could potentially and permanently change our coastal communities and their way of life.

This ruling set off a wave of uncertainty within the fishing community. NMFS had lost, leaving them facing reduced catches and yet another series of rule changes. They saw the plaintiff's recommended remedy and then NMFS' response, neither of which they could live with. As the judge set about determining the remedy which would directly impact their livelihoods, our fishermen had to put up their own money to hire attorneys in order to have their voices heard.

I strongly supported the attempts at a mediated settlement and was pleased when many of the parties, including NMFS, arrived at one. While the judge used the mediated settlement to guide her in her ruling, I share the frustration and exasperation of the fishing community that the ruling did not strictly follow the settlement. When is enough, enough?!

The ruling needlessly closes additional areas to fishing and uses an overly restrictive allocation system for days at sea. Fortunately, at last week's full Committee hearing Admiral Lautenbacher, the Administrator of NOAA, stated, and I quote, "We are going to appeal." I believe it is imperative that the Federal Government

comes through on this commitment and files an appeal by May 26, if the Court does not modify its ruling in response to the motions to reconsider that have been put before it.

Unfortunately, New England's experience is not unique. There are currently over 100 lawsuits pending against NMFS, including one NMFS lost just two weeks ago concerning Pacific groundfish. Now fishermen on the West Coast have to wait and see how this lawsuit will affect their livelihoods.

We must break this cycle. The courts should not be managing our fisheries—that is the job of NMFS and the Regional Fishery Management Councils. To do this we must change the way NMFS does business. NMFS must use a science-based management approach, not a court-based one.

We need the best fisheries science and research. Producing accurate and comprehensive stock assessments underlies everything that NMFS is required and expected to do. When we have stock assessments that are incomplete or inaccurate, there is no way NMFS can properly manage the fisheries stocks—thereby putting the fishing industry and the fishing resource at risk.

The sad fact is our fisheries management system is in a state of disarray. Fisheries management needs to be conducted based upon sound science in a reasonable and common sense fashion. We need to inject stability and predictability into the process. I know Dr. Hogarth has previously stated that he wishes NMFS could stop everything and just start over; unfortunately, fishermen do not have that luxury. This year fishermen in New England did not know what the fishing regulations were going to be until *five days* before the season started! Imagine the outcry if we treated all our industries this way.

I want to thank Dr. Hogarth and all of the witnesses for appearing here today to discuss this very serious issue. Dr. Hogarth, I know you have invested much time and effort in rectifying NMFS' management problems. I also know that you personally spent five days negotiating the settlement for the recent New England groundfish lawsuit. While I appreciate your hands-on approach, the fact remains that NMFS should not be in the courtroom making management decisions; NMFS needs to make sound management decisions on the front end.

I look forward to working with all of the witnesses in reversing this destructive trend. I truly believe that we can get NMFS to manage fisheries in a way that promotes sustainable fisheries and allows our fishermen to fish.

I thank the Chairman again for holding this hearing, and I look forward to hearing from Dr. Hogarth and the rest of the witnesses.

Senator KERRY. Thank you very much, Senator Snowe.
Senator Breaux.

**STATEMENT OF HON. JOHN B. BREAUX,
U.S. SENATOR FROM LOUISIANA**

Senator BREAUX. Thank you very much, Mr. Chairman, and thank you for having this hearing. This is really the first we've had on fishing issues in over a year, and I think it's very timely to take a look at where we are. I've been fishing for 30 years, 14 years in the House and 16 years in the Senate, and still haven't gotten it right. I hope that we can do what is necessary to assure that the National Marine Fisheries Service, the lead agency in managing the fishing resources of the country, can do the work that Congress intended and the American public expect.

I'm concerned. I think we're in a crisis not just in the resources, but also in the entire management program. I think that we cannot, as Senator Snowe said, manage by litigation. I think it has increased to an unacceptable point. Some will argue, well, there's nothing wrong with litigation. It's part of the American system. And that's true. But, some will argue that litigation occurs because the system is broken and not running as it was intended. That shouldn't be the answer to the problems. We shouldn't have to litigate every issue that comes up in order to find the right solution to the problem.

These management decisions are going to be only as good as the people that make them. I remember making—trying to make sure, through legislation, that the councils were balanced, that they were properly balanced between commercial fishermen and recreational fishermen. I think that's, in some cases, out of the window now. Some of the councils—my own council in the Gulf, I think, has two commercial fishermen on it out of 16. That's not balanced and the secretary has to approve these. But we're only going to get management plans as good as the people are that are making the decisions.

We've got some good people. Dr. Hogarth, we are on your team. Mr. Benton, we are pleased with you, individually, but there's some real challenges out there. And hopefully, working together, we can improve the system.

Thank you, Mr. Chairman.

Senator KERRY. Thank you very much, Senator Breaux.

Senator Stevens.

**STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA**

Senator STEVENS. Mr. Chairman, I listened with great interest to your statement and to Senator Snowe's. As I walked over here, I thought about the bill that's on the floor, \$7 billion in addition to what the President requested for the farm community for just 1 year. I think part of the problems we've had are because we've been just too timid to recognize the need for some sort of funding to provide the stability that's necessary in the fishery communities.

Having said that, let me say to you that when the situation was different and my party was in the majority, we held a series of hearings in New England, the South and on the West Coast to track the developments of this act. In waters off my state, more than 50 percent of the U.S. fishery products are brought ashore. In that area, I think that the 1976 act is basically working. It has some problems, but when Senator Magnuson and I presented the bill in this Committee in the 1970s, it was designed to extend the jurisdiction of the United States to 200 miles off our shore and actually to Americanize the fisheries off Alaska because of the tremendous foreign fleets that were there vacuum cleaning the bed of our oceans off our shore, representing half of the coastline of the United States.

You're right, we have modified this act several times, primarily in the area that I represent, primarily to affect the area off Alaska and on the basis of consensus. I don't remember a battle over amendments to this act since 1976.

I'm hopeful that, as we review this act and its great problems in New England in the Southeast and also on the West Coast—I don't know of many problems in the Gulf—

Senator BREAUX. Ha.

[Laughter.]

Senator STEVENS. I mean from the point of view of the act working there. You have economic problems. We all have economic problems.

But I do think that we have to keep in mind the concept that was developed with the Act. I think it's the most successful federal-

state management program that's been devised. We did create councils. And the states yielded some of their powers to the councils. And the Federal Government yielded some of the federal powers that were delegated to these regional councils. Those councils really have one basic duty, and that is to protect the reproductive capacity of the species within their jurisdiction.

The act was not an act for fishermen. It was not an act for processors. It was not an act for consumers. It was an act to protect the basic reproductive capacity of our fisheries. If we keep that in mind, I think that there are many amendments that could be made, many actions that could be made to make the council system work where it's not working.

But keep in mind, the Governors nominate the members of these regional councils and a federal official, the Secretary of Commerce, selects from those recommendations. It is still a federal-state operation, and I think we have to keep in mind that we should listen to some of these Governors along the line to see what their comments might be with regard to changing the act itself.

I am concerned about two proposals I've heard. One would remove the Governors from this nomination process and bring back to Washington the nomination of people to serve on the regional councils. If that happened, every one of us would be involved in every nomination, and there would be regional battles wherever there is more than one state. We tried to avoid that and I think we should think seriously before we remove the Governors from the process and move the whole nomination and appointment process back to Washington.

Another proposal that I've heard is that we should limit the councils to making only allocation decisions and let the National Marine Fisheries Service make the conservation decisions. Who can make the decision of what's a conservation decision and what's an allocation decision? What allocation does not have conservation impact? I do not believe we should bifurcate the powers of the councils, and I think it would render the councils meaningless if that would happen.

To bring the authority back to Washington to try to determine what is right means that we would nationalize the fisheries again, and we would have policies designed for New England, or for the Gulf, or for the South Atlantic Coast come into the practices for the great area off my state. Senator Magnuson and I realized the impact of that long coastline in Alaska. By the way, those fisheries were then dominated by Washington State; we all know that. There is no question that what we tried to do was to recognize that in the fisheries off the various portions off of our coast, different management styles are needed. That is why we regionalized the concept. To have this nationalized again, I think it would end up by destroying our fishery.

I don't want to take too much time either, but let me tell you just the history of the pollack. Pollack was originally taken by the Japanese fisheries, put into a sort of a gory hole in the center of the vessel, and everything was ground up and it was made into fish meal—no differentiation. I have a picture in my office still of fur seals, of halibut, of salmon, everything that came in in those nets

went into that thing and was ground up. It was a devastating fishery that they were conducting.

We were able to get down to where we could look at the science of each species. Pollack has increased fivefold in its biomass since the Magnuson Act was passed. The reason is, we increased the size of the mesh of the nets, allowing the very juvenile and mid-generation to go through the net only harvesting the larger ones, because the larger ones are cannibals. They eat their grandchildren. It was a declining species until we managed it, and now it's increasing and is one of the major fish consumed by Americans. Now, that is good management, and it comes about by regional management, not by national management.

So I urge you, as we discuss this, that you keep in mind the problem. I am very sensitive to the problem that's developed in New England around lawsuits. We had to survive a lot of lawsuits in Alaska. As a matter of fact, they're increasing all over the country.

I don't know if you know this, but I also sponsored, along with my friend from Washington, Senator Jackson, the National Environmental Policy Act. There are suggestions here that we should bring NEPA back into the process of the council so that everything that's done by the council should go through a NEPA process. My God, one of the problems is right now we are more and more relying on imported fish because of what you mentioned, Mr. Chairman, the massive regulatory impact of the Federal Government on our fisheries today. Chilean salmon, when it comes in here, as it does now, by millions of pounds, doesn't face any of the controls that our salmon face. I think we've done a pretty good job trying to protect our salmon, but there's still many questions out there.

I really come to where I started. We're not going to solve this problem until we go to the American people and say fish is food, just like food from Nebraska or corn from Nebraska or wheat from some other place. We have to have some stability in terms of long-term financing for this program. I'd be in favor of going out there and taking a billion dollars off that Farm Bill and say, "You don't need it. You're paying enormous corporations subsidies, and here we've got this small fishermen of the country disappearing because there is no stability under them."

I really believe the answer is not to really dismantle the Magnuson Act. I'm honored to have my name added to it, but at the time I wrote that bill, my colleague opposed it. And Senator Magnuson said, "Give it to me and we'll get it passed," and he did. So the next year, I asked the Congress to name it after him. Twenty years later, Senator Magnuson asked—Senator Hollings that my name be added. But there is no question, we needed it in Alaska at the time.

This bill, the Magnuson Act has worked in Alaska, Mr. Chairman. Those of you from other parts of the country, I urge that you look to what we've done in order to survive under it. We will help you in every way we can to give you whatever authority, whatever powers you need, to bring back the fisheries off your coast. But, please, let's let what's working work. As Senator Hollings used to tell me, "If it ain't broke, don't fix it." All right?

Senator KERRY. Let me just say to the Senator, if I could, Senator Wyden.

First of all, I appreciate his comments and his involvement enormously, and he and I have worked on this for a long time. In fact, I recall a similar story. I think I wrote the bill one year when we were still in charge of the Senate. Then the Senate flipped and my bill became your bill. So we've been through these sorts of flips and transitions. I know you look forward to that again.

[Laughter.]

Senator KERRY. But this time, I think we're going to pass my bill before that ever happens.

[Laughter.]

Senator KERRY. Our bill. Our bill. But let me just say, Alaska—you're absolutely correct, Senator, and I applaud Alaska for it. Alaska has probably been the most successful example of how this could work. I think what you all did in Alaska—I say this to my folks, and I say it to other parts of the country—I believe you limited access. In doing that, you also limited access where you had a larger biomass.

Our problem is clearly definable. We've got a smaller biomass, and we don't have the limited access. We've got this struggle; it's an economic struggle. It's people who have got mortgages on boats, who have got families to feed, who have got years of history in this industry, who are competing with each other for this resource that's being denied them.

That's why you get lawsuits and why some of the tough decisions have not been made. One of the ways you make that tough decision easier is by providing financial resources. I managed to get \$10 million into the Farm Bill for some additional buyout, and we couldn't hold it in the conference—\$10 million for people who farm from the ocean. Well, billions of dollars have gone out to some of these large corporations who are just collecting rent on some of these places. They're not even there farming and I think it's a disgrace.

Your powerful position, Senator Stevens, on the Appropriations Committee, is critical to us, and I'm delighted to hear you say you're going to try to help us do this, because we need to help find a way now to deal with the access issue so we can bring the biomass level back. I'm going to ask Dr. Hogarth today because we don't even know the answer to the question: How many boats will our fisheries support? Somebody's got to lay this out. Then we've got to come in and, accordingly, make that hard choice.

I agree with the Senator, it has worked in Alaska, and they've made some tough choices, and it is a model for what we have to do elsewhere. But, part of the reason we haven't been able to make some of those decisions is because we haven't been able to get adequate science, adequate monitoring, and adequate consensus built regarding how to make the choice. Some of that is dependent on the resources necessary to be able to do it. So we really do need this help, and I hope this will be the year we're going to make it happen.

Senator Wyden.

**STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM OREGON**

Senator WYDEN. Thank you, Mr. Chairman. Having written no bills in this area, I bring a considerable interest in working with you and Senator Stevens on these issues. I think you have correctly identified that, without the dollars, it's simply not possible to do the work that needs to be done. I also think Senator Stevens has made the point that, overall, this is a statutory framework that works. The federal-state relationship makes sense. It's one that I support.

In our state, fisheries are a multimillion dollar industry, and we now face the prospect that fishery management decisions being made 3,000 miles away are sticking a big harpoon in the Oregon coast, into a key industry. We have got to have a capacity reduction program immediately so we get the right number of fishers out there at the right time catching the right number of fish, if we're going to have a sustainable industry.

Dr. Hogarth met with me last month to discuss these issues, at my request. He's going to Oregon. He's going to be visiting the fishing communities, Astoria, Newport, and Coos Bay, next week. I think Dr. Hogarth knows that we have got to get beyond the kind of paper shuffling that has been so frustrating to people in our part of the United States. What has happened is we've looked at capacity reduction, better stock assessments, and assistance to fishing families and the fishers during the critical times, but so often pledges are made without the follow-through.

I appreciate the chance to be with all of you. You all have been experts in this area. My sense is—this goes back to the point Senator Stevens made—there is the legal authority in the Magnuson statute to do virtually all of what we have been talking about. So if we can use this legal authority plus the resources that Chairman Kerry is talking about, I think we can address some of these needs that are so heartfelt in areas of our country.

I thank you, Mr. Chairman, for the chance to be with you.

Senator KERRY. Thank you, Senator Wyden.

Senator KERRY. Dr. Hogarth, thank you for your patience and, Mr. Benton thank you very much for being here with us. We look forward to your testimony. If you could keep it to a summary, hopefully 5 minutes, then we will have an opportunity to really draw out your testimony in questions, which I think is important for the Committee.

Thank you.

**STATEMENT OF DR. WILLIAM T. HOGARTH, ASSISTANT
ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE
FISHERIES SERVICE, NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION**

Dr. HOGARTH. Thank you, Mr. Chairman. I am Bill Hogarth, the Assistant Administrator for NOAA Fisheries. I'm very happy to be here today and discuss this issue with you. It is an issue of utmost important to not only us, but the whole entire nation. You are the experts that we need to work with as we try to work through this process.

I appreciate the kind comments that you made. When I talked to Secretary Evans about this job, I thought that the end of my career would be the time to take it, because there are tough decisions that need to be made. As I stay in it, I think maybe it needs a younger person, not a person like I am.

But anyway, the emphasis of the National Marine Fisheries has changed since 1976, when the Magnuson-Stevens Fishery Conservation and Management Act was enacted. The act was enacted to get rid of foreign fleets and to develop our fishery in the U.S. We did it. We did a great job. Congress gave us the tools of loans to upgrade our fishermen with gear, vessels, and we did a great job. But in doing it, I think we sort of lost track with sustainability. We were too much determined with what is the underutilized fishery, how can we buy vessels, how can we get people into the fishery, and we didn't stop to think about the long-term sustainability.

As a result, we now have technology that enables fishermen to locate fish very quickly. They're much more efficient. And, as a result, we have too many fishermen chasing too few fish, as people have talk about most of the time. As a result, the resources have declined, and fishermen and the communities are facing economic disasters. And so now we have to look at about how to resolve this.

And since the 1996, with the passage of the SFA, the emphasis has become conservation. The National Marine Fisheries Service and the councils are now directed to stop overfishing, reduce bycatch, rebuild overfished stocks within a specified timeframe, and to protect the central fish habitat. But not only was this a change of focus, it was a tremendous change in workload and a challenge, not only for the agency, but for the councils themselves.

How did we respond to this? We responded by more regulations. I think, as Senator Kerry, you said earlier, we have the fourth-largest source of regulatory actions in the Federal Government. And these regulations can cause considerable socioeconomic hardships to commercial and recreational fishermen, processors, and their communities. And they're also under very close scrutiny by the environmental community.

While our regulatory burden was increasing, so was the complexity of the regulatory process. With the addition of the National Environmental Policies Act and the Regulatory Flexibility Act, you know, it's much more easy to sue the agency for not being in compliance with the process. Given the increased mandates and the complex regulatory requirements, we have been in litigation. When I took the job, I think there was 118. We're down to 104, but we need to be much lower than that. So I think the process even got you all's attention in the 2002 appropriations bill when National Marine Fisheries Service litigation was referred to as a crisis.

So with this background, and most of the comments that you all have made—I think I agree with one hundred percent—I'd like to focus just a minute on what I believe must be changed to improve the management of the nation's fisheries.

The agency and its mandates need to be modernized. We need better data collection. We need to be conducting annual surveys. We need to be improving our stock assessments. We need better infrastructure and mechanisms to reduce overcapacity and bycatch.

The process needs to be reviewed and streamlined so we can be more responsive to changes in the fisheries.

We are dealing with dynamic systems that are in constant flux, but we're managing by regulatory systems that are burdensome and do not enable us to respond to these changes, especially when the stocks are increasing. It takes at least 1 year, and closer to 2 years, to respond to the regulatory scheme in the act. And, in fact, we have some FMPs, fishery management plans, that have taken us up to 4 years.

However, we have taken steps to improve the process, and I want to publicly thank today, not only the employees of National Marine Fisheries Services, who I think are some of the most dedicated and hardworking people I've been in association with, but also the councils in the states for their work. The latest status of stocks report to Congress clearly demonstrates that we are making some progress. However, I recognize that we still have many critical issues to address.

From the agency standpoint, we are now going through what we call a regulatory streamlining process. A study of us said that there were 13 layers of duplication within the agency to get a rule out: 13 steps, 13 duplications. We're trying to get rid of this duplication. We are frontloading the process with the councils. We're getting them to work with us as we go through the scoping, and through the alternatives. We are delegating to the regions the authority to do more things than they've been doing in the past. We also think the Section VII process of the ESA—we have delegated to the regions, as of April 1st. So we are continuing to try to work through the process of getting this out to the field and work with the councils to get it done.

We're also looking internally at our science. How can we improve the science internally? What can we do for performance measures to make the agency perform better and measure that performance? This will be in a workshop on June the 10th we're having with our stakeholders.

This week we had a meeting with our stakeholders to talk about IFQs, what should be done. If you remove the moratorium, what type of criteria should we put in place?

We're now undertaking in the agency a review of the Sustainable Fisheries Act. It's been in place 5 years and is indicative of our efforts, as can be seen by our efforts to reduce bycatch. These are, indeed, extremely challenging times in our nation's fisheries.

National Marine Fisheries has three major acts: the Magnuson-Stevens Act, the Endangered Species Act, and the Marine Mammal Protection Act, but we also have 100 other acts that we have to be in compliance with. So we have a major workload.

I believe that we can meet with the challenges with your help. Working with the councils, the states, and all of our stakeholders in an open, transparent, and honest dialog, I pledge my efforts and those of the National Marine Fisheries Service to improve the U.S. fisheries with a focus on stability and sustainability tailored to capacity.

Thank you for inviting me today, and I will try to answer any question you may have.

[The prepared statement of Dr. Hogarth follows:]

PREPARED STATEMENT OF DR. WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Good morning, Mr. Chairman and Members of the Committee. I am Dr. William T. Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA). I want to thank you for the opportunity to discuss living marine resources management issues at NOAA Fisheries. In this testimony, I would like to focus on actions the Agency is undertaking to address the challenges facing us today, as well as outline some of the major issues that need to be addressed.

The Challenge of Marine Resource Management

NOAA Fisheries has responsibility for the oversight of living marine resources and their habitat through a number of statutes, including the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Sustainable Fisheries Act (SFA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). Resulting conservation responsibilities include fisheries, protected marine species and essential fish habitat.

Since 1976, NOAA Fisheries' mission has changed dramatically from promoting fishing in the U.S. exclusive economic zone (EEZ) to placing greater emphasis on sustainability and conservation of fishery and marine resource considerations and particularly, taking into account specific economic, social, environmental, and community issues. The SFA, which passed in 1996, included new mandates from Congress that represent fundamental changes to fishery management. As a result, a marked increase in regulatory activity has occurred. In addition to the provisions of the SFA, all of our management operations have to be assessed and disclosed to decision makers and the public under the terms of the National Environmental Policy Act (NEPA), as well as numerous other statutes and executive orders influencing how we go about developing and implementing regulations.

According to a recent study, NOAA Fisheries, which is a relatively small federal agency, is the fourth largest source of government regulatory actions. Not surprisingly, regulatory action generates controversy. Regulations issued by NOAA Fisheries affect not just marine resources but also the people, businesses, and communities associated with these resources. Impacts on fishing communities under such a scenario are unavoidable; the monumental challenge is to keep adverse impacts to a minimum while meeting the legal requirements of current laws.

Currently, there are 104 open lawsuits against the agency. These cases pending against NOAA Fisheries can be broken into the following categories: 37 dealing with Magnuson-Stevens Act and/or SFA claims; 34 ESA claims; and 25 other cases relating to a variety of issues. The legal challenges are distributed roughly equally between commercial, recreational, and environmental constituents. Notably, there have been three cases of great significance to fisheries management that did not involve a separate or discrete Magnuson-Stevens Act or SFA challenge, but the intersection of the ESA, NEPA, and SFA processes. These cases resulted in the injunction of major federal fisheries.

As you can see, the regulatory process is complex, requiring extensive analyses and documentation of our mandates. Overall, the complexity of the multiple mandates and their intersection have provided opportunities for litigation, have been difficult to reconcile, and challenge the agency to be responsive to the current state of fisheries and related resources. The timelines and requirements for public process, including NEPA, have challenged NOAA Fisheries to develop environmental baselines and documents that are up to speed with the actions being considered. NOAA Fisheries' implementation of this statute has not been structured to work with Magnuson-Stevens Act timelines. NOAA Fisheries is responding to these challenges, and done correctly, fishery management plans and NEPA analyses actually serve complementary purposes.

Responding to the Challenges

Several internal reviews have been done, with the goal to identify problems and develop potential solutions. In partnership with the Regional Fishery Management Councils (Councils), we are focused on ensuring full implementation of the SFA (prevent overfishing, restore overfished stocks), reducing fishing capacity, and implementing measures to monitor and reduce bycatch, and protect essential fish habitats—in order to allow long-term sustainable commercial fishing. In order to meet these goals, we will need substantial changes to the fisheries management status quo, and ensure the use of the broadest possible range of measures, including marine protected areas, individual fishing quotas, and ecosystem management. Sci-

entific data and analyses are necessary to provide sound advice for management decisions.

NOAA Fisheries has embarked on several initiatives to begin solving these large and difficult problems, thus serving our resources and constituents better. These include the Regulatory Streamlining Project (RSP), the SFA Five-Year Review, a study of overcapacity and buybacks, implementing budgetary recommendations from the Kammer and (interim) National Academy of Public Administration reviews, a review of fisheries science, and modernization initiative.

The Management Process: RSP

NOAA Fisheries has undertaken a major regulatory streamlining project with the goal to improve the efficiency and effectiveness of regulatory operations and decrease NOAA Fisheries' vulnerability to litigation. The RSP initiative highlights the application of NEPA as a critical component of the regulatory process. NEPA provides an analytical framework or umbrella that can be used to address the requirements of many other statutes and ensure environmental compliance, consistent with all of the agency's mandates.

The primary mechanisms NOAA Fisheries will use to improve the fishery management process through the RSP are based both on past recommendations and new initiatives. These include:

- "Front-loading" the NEPA process through the active participation of all regional, science center, and Council staff in key responsibilities at the early stages of fishery management action development. Operational guidelines will be revised accordingly;
- Hiring environmental policy coordinators to ensure national and regional consistency, facilitate front-loading of the NEPA process, provide advice on integrating statutes, coordinate national and regional NEPA training programs, and remain current on national policy issues related to environmental compliance;
- Improving the administrative process by delegating signature authority, where appropriate, from headquarters to the Regional Administrators for certain activities under the ESA and, where appropriate, and eliminating headquarters review of routine actions under the Magnuson-Stevens Act. This may involve some workforce reorganization/prioritization; and
- Improving the fishery management process in cooperation with NOAA Fisheries partners such as through electronic rulemaking and electronic permit application.

The goal is to provide better analyses and regulatory documents that form the basis of our management decisions. In short, within the next few years, NOAA Fisheries should have significantly fewer litigation losses on process issues and have better relationships and service to our constituents, and more effective conservation and management of the Nation's living marine resources overall.

Management Standards and Guidance: SFA Review

Working with our Council partners, NOAA Fisheries has made considerable progress in implementing the requirements of the SFA. Nevertheless, more work needs to be done in order to fully achieve its goals. Recently, I instructed our Office of Sustainable Fisheries to lead a review of SFA implementation. The review will be conducted in cooperation with all of our regions, science centers, headquarters offices, NOAA General Counsel, and the Councils. This is an important step in identifying priority tasks over the next year. The SFA Review will include the following:

- NOAA Fisheries and the Councils will identify SFA requirements that are not yet completed, and establish a strategy and timeline to complete the work;
- Implementation of National Standards (NS) 1 and 2 and National Standard Guidelines (NSGs) on overfishing and rebuilding are being reviewed. Amendments addressing concerns raised in this review will be undertaken by the Councils and/or NOAA Fisheries;
- A few weeks ago, NOAA Fisheries, Council, and other social scientists met to discuss and exchange information on the methods and research in the area of fishing community impacts (NS 8). The workshop focused on data and analyses for social impact analysis, development of a research agenda, and compilation of a NOAA Fisheries community impacts analysis practitioners' manual; and
- NOAA Fisheries has established a Bycatch Workgroup to review implementation of NS 9. Monitoring and minimizing bycatch and bycatch mortality, and establishing standardized bycatch reporting methodology, are top priorities for the

agency. NOAA Fisheries will also review the allocation of observer program funding to ensure the best possible coverage of fisheries for which bycatch monitoring is a high priority.

Addressing Overcapacity and Buybacks

One of the fundamental problems in fisheries management is overcapacity. Even fully rebuilt stocks cannot sustain the level of fishing effort associated with fleet sizes in many of the fisheries. NOAA Fisheries has prepared preliminary analyses of overcapitalization and estimated the number of vessels and costs for buyback programs in key U.S. fisheries. In addition, we are reviewing the effectiveness of previous buyback programs, such as the one in the New England groundfish fishery. NOAA Fisheries is also considering modifications to Magnuson-Stevens which would facilitate industry-funded buybacks that might be used in concert with complementary management tools, such as entry limitations and IFQs.

Budgets

NOAA Fisheries has taken steps to implement many of the resource and process recommendations included in the Kammer Report and other reviews, has acquired some of the needed resources, and has initiated management actions to improve its activities, such as RSP, as well as:

- Socio-economic analysis—NOAA Fisheries has identified steps to acquire additional data, economists, and social scientists, and is aggressively pursuing actions to improve socio-economic analyses required by the regulatory process;
- Stock assessment improvements—These are fundamental to NOAA Fisheries' success and the agency has recently approved a major improvement plan for these activities;
- Law enforcement—NOAA Fisheries is expanding cooperative enforcement efforts through new agreements with 25 states and territories and is adding staff to handle arrangements;
- Observer and Cooperative Statistics Programs—NOAA Fisheries has increased its number of observers nation-wide and has initiated greater data collection and analysis efforts with industry and regional and state authorities. These steps should help to reinforce other actions underway to improve NOAA Fisheries stock assessments, information on bycatch, and enforcement activities;
- Comprehensive Management—While recognizing that NOAA Fisheries conducts comprehensive reviews to capture the status and requirements for its science support functions, the Kammer Report recommended development of a nationally coordinated plan (status and requirements) for its management functions, i.e., fisheries, protected species, habitat conservation and enforcement. NOAA Fisheries has recently piloted an automated Annual Operating Plan system which will assist management in determining future program requirements and supporting budget requests. This system should be fully operational for FY 2003, and will be capable of determining individual program performance in NOAA Fisheries' regional offices and science centers, as well as provide agency wide crosscuts for national program activities.
- Adjustments-to Base—In recent years, NOAA has been successful in obtaining budget adjustments for inflationary cost increases which have seriously eroded core-mission program operations in the past.

Science: NOAA Fisheries Science Modernization

Several internal and external studies and reviews of NOAA Fisheries have concluded that much of fisheries controversy stems from the lack of information necessary in regulations to ensure long-term sustainability of living marine resources. Particularly now that so many stocks are overfished, implementation of such measures is often challenged on the basis that the scientific information supporting management is inadequate or lacking. While NOAA Fisheries scientists are world leaders at the forefront of developing stock assessment models and methodologies, the agency's science is sometimes hampered by the lack of adequate data on which to base stock assessments, the lack of adequate sampling platforms, and the lack of sufficient staff to collect, process, manage, and analyze data; to evaluate the implications of the assessments; and to effectively communicate the results to managers and stakeholders. Widening gaps between public expectation and agency resources required to satisfy such expectations have fueled numerous and increasing numbers of lawsuits on the policy choices, and have resulted in the agency operating in a continual state of crisis management.

NOAA Fisheries is evaluating a long-term Science Modernization Initiative to create the holistic and integrated science infrastructure, that when added to the RSP, will begin to move NOAA Fisheries out of crisis management. Components of this initiative will represent the implementation of recommendations by external reviews, such as the National Academy of Sciences, as well as internal reviews, such as the Data Acquisition Plan and the Marine Fisheries Stock Assessment Plan. Highlights of the Modernization needs include:

- Improve and expand living marine resource stock assessments, including cooperative research; a national observer program; enhanced protected species stock assessment capabilities; a national, web-enabled, state-federal data collection program; increased charter vessel days at sea; and modern acoustically quiet fisheries research vessels;
- Improve forecasting of living marine resource stock status and environmental impacts through advanced assessment technology, applied fisheries oceanography, and advanced conservation engineering technology for bycatch reduction and habitat protection;
- Adequately assessing the human dimension of fisheries by conducting expanded analyses of the socioeconomic impacts of our fishery management programs.

Conclusion

Mr. Chairman, these are exciting and challenging times in the history of the conservation and management of the Nation's valuable marine resources. It is natural for many to look at the negative. But I think we also have a lot that gives us reason to accentuate the positive. Our recent Status of the Stocks report to the Congress showed that the number of fisheries listed as overfished is beginning to decline. For many of our stocks that are still depressed, we have at least been able to eliminate overfishing, giving them the opportunity to recover. We are getting better information on our fisheries.

NOAA Fisheries staff are hard working, talented, and dedicated individuals. We are addressing our challenges by working directly with the Councils, regions, headquarters offices, and NOAA General Counsel to review our SFA implementation, improve the regulatory process, and ensure adequate science and administrative support for these efforts. I plan to share my vision for NOAA Fisheries with our constituents in a series of workshops to be held in key locations around the country later this year. This will also provide an opportunity for me to hear from our varied constituents about their views for the agency over the next 5 to 10 years.

We in NOAA Fisheries look forward to working with the Committee, with your staff, with the Councils, the states, and the commercial fishing, recreational fishing, environmental, scientific and other marine fisheries communities to continue to improve our operations and our effectiveness in meeting the mandates that you have provided.

Thank you, Mr. Chairman. I would be glad to answer any questions.

Senator KERRY. Thank you very much, Dr. Hogarth. We appreciate it.

Mr. Benton.

STATEMENT OF DAVID BENTON, CHAIRMAN, NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

Mr. BENTON. Thank you, Mr. Chairman. For the record, my name is David Benton. I serve as the chairman of the North Pacific Fishery Management Council and also the chair of the North Pacific Research Board, which is a multiagency organization, newly formed, to put together a comprehensive marine research program for the North Pacific.

Listening to your remarks, Mr. Chairman, I'm going to forego a number of things that I was going to say. I wanted to highlight some of the successes we've had in the North Pacific, but you all obviously have, in large part, recognized that.

I want to compliment Dr. Hogarth. In my experience, of some 20-odd years in fisheries management, I think we have a leader in the National Marine Fisheries Service right now who has taken the

bull by the horns and is doing an excellent job in trying to solve some of the problems, endemic problems, that that agency has faced for a very long time.

Mr. Chairman, in your remarks, you acknowledged the record that we have in Alaska. I want to touch on, briefly, some of the key pieces that make that record a success, and I'd also like to touch on, just very briefly, some of the issues that are facing all the councils—not just our council, but all the councils around the country and the management, in light of some of the remarks that you and others on the Committee have made.

We're very proud of our record up north. We have sustainable fisheries that we have maintained for 30-plus years. We've done that because, as you noted, we made some hard choices. We made them early on, and I think they've served us well. It's not always been pleasant to sit in a room with 100-some-odd fishermen and have to tell them, "Here's the bad news." And every once in awhile, you do get to sit in a room and tell them, "Here's some good news," and that sort of makes up for it.

But the components that make it work, at least for us, first off, is that we started off with a precautionary approach to fisheries before that term ever became, sort of, the chic term of art that it has become, and it started right with the very beginning. Our council established what was called the "2-million metric ton cap" in the Bering Sea that said that no matter what the size of the stocks, no matter how large the stocks grow, we're not going to harvest more than a collective 2 million tons out of the Bering Sea. Right now, it's about 60 percent, 65 percent, of what could be harvested, according to our scientists. We've always maintained that. We consider that, sort of, an ecosystem approach that maintains a real basic conservation level.

Our council insists on a very rigorous scientific review in terms of establishing harvest rates and catch limits. The scientists that are in National Marine Fisheries Service, the State of Alaska, academic sources that sit on our plan teams and sit on our SSC, they are the ones that tell us what the allowable biological harvest levels should be. Our council has never voted to exceed those levels that have been recommended to us by our scientific institutional committee, ever, and we refuse to do that. Every once in awhile, we'll be a little bit more conservative than them, for a variety of reasons, but we have never voted to exceed those limits.

We have a very rigorous in-season monitoring program. We have observers on the vast majority of our vessels—30 percent on smaller boats, 100 to 200 percent on the larger boats.

Senator KERRY. Is that industry-paid-for?

Mr. BENTON. The industry pays for them. Now, we have a luxury, I think, that, say, in New England, you probably do not have, and that is we have—you know, with healthy fisheries, the industry can afford to pay for observers. But that program started in the late 1980's, early 1990's, and industry stepped up to the plate and supported it wholeheartedly at the beginning. And, in fact, it was an industry initiative. And I think that's a key.

We, early on, got into the bycatch reduction and control business. As Senator Stevens noted, the foreign fleets were very indiscriminate in how they prosecuted the fisheries off our coast, and we es-

established very strict limits on bycatch. And I'm very pleased to say that, right now, bycatch rates for, say, halibut, herring, salmon species in the Bering Sea are less than or right around 1 percent of what the stock of those species is. That's a reasonably decent rate. We need to do more, and we're going to do more.

With economic discards, which is one of the changes that you all put in the Sustainable Fisheries Act in 1996, we went from 800 million pounds of discarded product; these are target species that were being harvested and then thrown away. We've reduced that by over half. We've got a lot more work to do there. We've got a program that's going to go in place in 2003 that'll take another big bite out of that discard waste, and we're looking—you know, we're looking forward to continuing that kind of effort.

With regard to ecosystem principles, we have, as I noted, a 2-million metric ton cap. We incorporated that. But we have a whole series of ecosystem measures that we're looking at. And those include things like Stellar sea lions. You mentioned those. Every time the agency has come to us with a sea lion problem, we have responded. The litigation you mentioned was somewhat of a forcing mechanism. I think that's right. But in the end, it also became a stumbling block, because it got in the way of actually reaching a solution. We've got comprehensive sea bird protection measures. We've got bans on forage fish harvest. We've done a lot of those kinds of things.

I'm going to turn now, Mr. Chairman, very quickly, to some of the issues that you all have raised, in terms of process and what you've called the "crisis" in our fisheries. And from our perspective, and I think this is true for all the councils, it really is this litigation box that we're finding ourselves in, and it does come largely from procedural issues. Very few of these lawsuits are based on—or have been won on substance. A lot of them have been won on process and procedure. And most of those have to do with the discontinuity between NEPA and the Magnuson-Stevens Act.

I see my time's just about up, and so I'm going to wrap this up real quickly.

Senator KERRY. Please finish your thought.

Mr. BENTON. Well, the—I'll give you one of the, to me, most perverse results of NEPA litigation. The SFA, in 1996, contained provisions to look at designating essential fish habitat and protecting fisheries habitat. And I think all the councils were well on the way of doing their job on that, some maybe better than others. Our council was right on the verge of identifying habitat areas of particular concern and getting those habitat areas designated and protected.

Environmental organizations filed a lawsuit, stopped all the work on habitat protection. It's now 2 years later. We are just now beginning to go at it again, and they just settled with the National Marine Fisheries Service for a time line that extends out yet another 3 years.

We're going to find ourselves, the council process and National Marine Fisheries Service, being severely criticized for not doing enough to protect fisheries habitat. And the reason that we're not is because of lawsuits that are procedural in nature, that the envi-

ronmental community mounted and put us in a Catch-22. That's one of the more perverse results of litigation.

Senator KERRY. What are they asserting?

Mr. BENTON. Dr. Hogarth could probably comment a little bit better on this, but it was basically that the national rules, national regulations, were inadequate and that there was an inadequate environmental impact statement on those regulations and on that program, and they went on the procedural grounds, and we have to go back and redo environmental impact statements.

There was no finding in the case, that I'm aware of, that said that we weren't doing what we should, that we were not looking at protecting habitat. It wasn't an MSA violation. It was a procedural violation under NEPA. And, as I said, at least in the North Pacific, we were, like, maybe 6 months, 9 months, away from finally designating habitat areas of particular concern, places that were—we decided were pretty darn important to protect fisheries habitat, but that all got stopped and put on hold until we go through the drill with NEPA.

And just one other final point on NEPA, Mr. Chairman. It has another perverse result. And I know some folks have said that, well, you need the NEPA analysis to look at all the effects and look at all the—you know, sort of comprehensively. All right? I think that the MSA process requires us to look at what's happening throughout the marine environment when we take an action. I don't think that's the issue.

But here's one other very perverse result. We are in the process of reforming our procedures for setting harvest rates to comply with NEPA. Presently, the way that our council does its business is, the National Marine Fisheries Service does stock assessments that are concluded in the summer. The scientists work on the data, and give us the results usually around October/November. The council takes that information and sets harvest levels in December for the fishery that starts in January. That's the way we do it.

Clearly, that time line doesn't comport with NEPA time lines. In order for us to fit within the NEPA time line, what we have to do is, we have to go out for public comment, rulemaking, more public comment, more rulemaking. What that means is that our tax-setting and harvest rate-setting process is going to be using 1-year-old data. We will not be able to use the most recent data. That's going to put us in a very difficult situation.

If we have—for example, if we have a stock of fish that we think is reasonably healthy, we can harvest it at this rate in year 1 under our normal process. We would have information at the end of year 1 to set that harvest rate for year 2 based on what happened—you know, what was going on with that stock. Now it's not going to be that way. Now it's going to be, we're going to use 2-year-old data, basically.

Senator KERRY. So what do you think we should do? What's the recommendation? How do you reconcile this difference with NEPA? Can we adhere to the environmental designs of NEPA and of the process without doing damage, but still move the process forward? What's the recommendation?

Senator STEVENS. The problem is that the timeframe doesn't match.

Senator KERRY. Right. I know.

Senator STEVENS. And I think we have to look at the concept of trying to say, yes, look at the NEPA procedures, but it must be within the Magnuson Act timeframes. And if the court was told that, they would stay out of the management of fisheries more.

Mr. BENTON. Mr. Chairman, if I might, I very much agree with that. I don't think that anybody is arguing that there should be an exemption from the kinds of environmental impact assessment—

Senator KERRY. But just coordinate it more intelligently.

Mr. BENTON. It just needs to be coordinated. The time lines need to be made compatible, and they need to be, as Dr. Hogarth has said—

Senator KERRY. Well, we should do it.

Mr. BENTON.—they need to be real time. I mean, we're dealing with a very fluid kind of thing, and we need to have the time lines to fit in with making real-time decisions instead of things that are geared toward, you know, 10-year project time lines.

Senator KERRY. Fair enough. Both statements, full prepared statements—all the statements of each witness will be placed in the record in full, as if read in full.

[The prepared statement of Mr. Benton follows:]

PREPARED STATEMENT OF DAVID BENTON, CHAIRMAN, NORTH PACIFIC
FISHERY MANAGEMENT COUNCIL

Introduction

Good morning Mr. Chairman. For the record, my name is David Benton. I serve as the Chairman of the North Pacific Fishery Management Council. I also serve as the Chair of the North Pacific Research Board, a multi-agency organization which is establishing a long-term, comprehensive marine research program for the North Pacific and Bering Sea. The NPRB is newly formed, but will over time administer a multi-disciplinary research program providing research funding at about \$10–15 million per year.

First off, I want to thank you for the opportunity to offer comments to the Committee on our fisheries management process. I would liked to touch on two major areas today. Of course, because I am from Alaska, I want to highlight for you some of our successes as well as the issues facing the North Pacific Fishery Management Council as we work to conserve the vast marine resources of the North Pacific. I also want to discuss with you some of the issues facing all the Councils.

North Pacific Fisheries Management

I am going to start with the North Pacific. Needless to say, we in Alaska are proud of our record in meeting conservation goals and maintaining healthy fisheries. Working together with the National Marine Fisheries Service (NMFS) and the Alaska Department of Fish and Game, we have been very successful at managing the federal fisheries off Alaska. Given the focus of this hearing and the time constraints, I will not provide the endless details or numerous examples of these accomplishments; however, they need to be recognized and I have provided a supplemental folder of materials that summarize the overall management philosophy of the North Pacific Council and provides examples of what we are doing to conserve fish stocks, protect habitat, manage and reduce bycatch, and incorporate ecosystem considerations into fishery management decisions. I hope that these materials, which are in the white folder with our Council logo, along with my testimony, will be of use to the Committee as you consider what is right with our fishery management system as well as ways we can strengthen it.

Alaska's fisheries are valued at over \$1.1 billion annually, before processing, and provide over half the volume of fish landings in the United States. They are a powerful economic engine for coastal communities off Alaska, and provide tens of thousands of jobs in the fishing and processing industries throughout Alaska and the Pacific Northwest. With so much at stake, the North Pacific Council has approached fisheries management with an eye towards long-term sustainability of marine resources. Our formula for sustainable fisheries involves strong science and research

programs, an effective reporting and inseason management program, a comprehensive observer program, limitations on fishing capacity, precautionary and conservative catch limits, strict limits on bycatch and discards, habitat protection measures, incorporation of ecosystem considerations, and an open public process that involves stakeholders at all levels. Here are some examples:

Precautionary and Conservative Catch Limits

Annual catches of our fish stocks are controlled by strict harvest limits (which includes all catch for each species whether targeted, retained, or discarded). The Council establishes annual harvest limits for each stock at a level that never exceeds a biologically safe and precautionary harvest level recommended by the scientists on the Plan Teams or Scientific and Statistical Committee. Our scientists set harvest levels in a precautionary manner; when less is known about the dynamics of a stock, the more conservative the harvest rate. Fisheries are closely monitored and closed when the harvest limits are reached. As an additional precautionary measure in the Bering Sea, the combined annual harvest limits for all species is limited to no more than 2 million metric tons, which is only about 65 percent of what could be safely removed without impacting fish stocks. The application of conservative catch limits has resulted in sustainable catches. Annual North Pacific groundfish harvests have been sustained in the 1.5–2.5 million metric ton range (3–5 billion pounds) for the past 30 years.

All of our groundfish stocks are considered to be at healthy biomass levels. None of our groundfish stocks are considered to be “overfished”. I should note that I dislike that term “overfished” because it implies that stocks got to low levels because of fishing, when in many cases the causes are related to environmental change or other factors. The marine ecosystems off Alaska are dynamic, and fish stocks increase or decrease in response to environmental changes, and generally not in response to the levels of fishing mortality found in our fisheries today. Of course, prior to the Magnuson Act, and even into the 1980’s, some stocks suffered from fishing pressure largely from foreign fisheries. But today’s management takes into account total mortality, and sets very conservative harvest limits to ensure sustainability.

For the two crab stocks in our region that are considered to be overfished, we implemented aggressive rebuilding plans—the fisheries have been closed entirely—even though scientific data indicated that abundance of these stocks depends almost entirely on environmental factors. And, bycatch in other fisheries has been significantly constrained. Due to these efforts, we are seeing some improvements, but recovery will ultimately depend on ocean survival conditions which appear to be dependent on long term environmental factors.

However, in our quest to always look for better ways to meet our obligation to conserve our nation’s fishery resources, the NPFMC has recently established an independent scientific review process to look at our overall harvest strategies, especially the process and science which we use to establish harvest rates. The Council has contracted a group of independent, international experts to critique our system and make recommendations for improvements. We expect to receive their report later this year.

Observer Program and Inseason Catch Monitoring

Our comprehensive observer program (averaging about 36,000 observer days annually) and inseason monitoring program are integral to the conservation of our resources. Observers measure catch and bycatch and collect biological information. Observers are required on all vessels longer than 60 feet, and at all but the smallest shoreside processors. Observers are placed on vessels and processing plants through a NMFS—certified contractor, and the costs for the observers are borne by industry, not by the government. Inseason managers at NMFS use information provided by the fleet on weekly catch and processing reports, as well as daily information from onboard observers, to manage complex area and seasonal quotas. The combination of timely reporting and observer information allows managers to monitor catch levels and close fisheries so that catch and bycatch limits are not exceeded.

Bycatch Reduction

The Council has been concerned about bycatch of non-target organisms since the implementation of the first fishery groundfish management plan in 1979. Catch limits have been placed on species traditionally harvested by other gear types (halibut, crab, herring, and salmon). The intent is to minimize the impacts of bycatch on non-target populations while at the same time allowing directed fisheries to be prosecuted. For example, current allowable bycatch levels in the Bering Sea and Aleutian Islands area equate to less than 1 percent of the halibut, crab, herring, and chum salmon populations. Bycatch of chinook salmon has slightly larger impacts, in the order of 2 percent to 3 percent, and the Council is pursuing several initiatives

to further reduce this level. In addition, the Council has initiated work to adopt salmon bycatch controls in the Gulf of Alaska in addition to controls already in place on halibut.

Another type of bycatch is comprised of target and non-target species that are caught but then discarded. This discard bycatch is thrown back into the sea and considered wasteful by many. We have made considerable progress in reducing this type of bycatch. For example, in 1993, over 17 percent of the groundfish caught off Alaska were discarded. By 2001, less than 7 percent of the catch was discarded. In raw pounds this equates to a discard of about 350 million pounds in 2001, down from over 800 million pounds in 1993. This reduction is partly due to implementation of full retention and utilization requirements—you catch it, you keep it—for major species such as pollock and cod. The fishing industry has also worked to reduce bycatch in a voluntarily manner by sharing catch information and modifying gear to allow unwanted fish to escape. Additionally, the formation of cooperatives in the Bering Sea pollock fishery, as prescribed under the American Fisheries Act, ended the race for fish. This allowed vessels to slow down fishing operations, and combined with our ongoing bycatch reduction efforts resulted in further reducing bycatch and discards. The cooperatives also aided the development of additional markets for lower valued species, and significantly increased utilization rates (pound of product per pound of raw fish harvested).

Further reductions in discards will be achieved with full retention requirements for flatfish, which are currently scheduled to be implemented in 2003. We also are continuing to evaluate additional approaches to bycatch reduction, including assignment of individual vessel accountability, bycatch avoidance techniques, and bycatch pools under a cooperative-style approach.

The Council recently started a new initiative to look broadly at further bycatch reductions. As Chairman, I will be appointing a stakeholder committee to review each of our various fisheries and make recommendations for programs to further reduce and manage bycatch. In reality, this is a resumption of work the Council had been engaged in a few years ago, but was put on hold because of the need to respond to litigation, mostly to do with procedural problems under NEPA.

Habitat Protection

We all know that most fishery resources depend on healthy sea floor habitat. Although scientists have only a limited understanding of the distribution of benthic habitats off Alaska, and how these affect fish production, the Council has established numerous marine protected areas to reduce potential effects of our fisheries on habitat. Bottom trawling has been prohibited from a large portion of the continental shelf to protect sensitive fish and crab habitats. Closed areas in the Bering Sea total more than 30,000 square nautical miles, bigger than the State of Maine. Closed areas in the Gulf of Alaska are even larger, totaling about 45,000 square nautical miles. Management measures related to protection of Steller sea lions were implemented this year which include additional closures of vast areas of the Gulf of Alaska, Bering Sea, and Aleutian Islands to trawling, and in many cases, to all fishing with any gear type.

This work was in progress several years ago following the passage of the Sustainable Fisheries Act in 1996, but was subsequently put on hold due to lawsuits filed by the environmental community. They prevailed on procedural matters, with the overall effect that work on habitat protection essentially stopped until NEPA requirements were addressed. The Council is back at it though, currently working on an accelerated time line to develop and implement alternatives to improve the essential fish habitat protection program off Alaska. We are conducting a thorough evaluation of our fisheries, through an EIS process, and expect to recommend significant actions in 2003.

Ecosystem Considerations

Over the past several years, the Council has been developing an ecosystem-based approach for management of our groundfish fisheries. The principles and elements of our approach are essentially the same as recommended by the Ecosystem Principles Advisory Panel in their report to Congress and by the National Academy of Sciences in their report on sustaining marine fisheries. In fact, one of the authors sits on our Council and chairs our Ecosystem Committee. While we have yet to take the next step and develop specific fishery ecosystem plans, our strategy is to minimize potential ecosystem effects while allowing for sustainable fish removals as we gain the knowledge necessary to implement more specific measures.

In the meantime, a number of measures have been implemented to reduce potential effects of fisheries on marine mammals and seabirds. As a precautionary measure, directed fisheries for forage fish species are prohibited. In addition, we have

dispersed fisheries over time and space to reduce potential for competition with Steller Sea lions, and prohibited vessels from fishing too close to the areas of land on which they haul out or give birth. To reduce seabird bycatch in longline fisheries the Council recently approved a suite of regulations requiring vessels to use deterrent devices. These are some of the more stringent measures in the nation and possibly the world. And, while it is anticipated that these deterrent devices will reduce seabird bycatch by over 80 percent, the Council is also committed to working with the U.S. Fish and Wildlife Service to review and improve seabird avoidance measures in the future.

In concluding my remarks on North Pacific fisheries issues, I want to emphasize that the North Pacific Fishery Management Council is committed to conservation. We do our best to base our decisions on sound science and when there is a question, we try to err on the side of conservation. In recent years, much of our effort has, unfortunately, been focused on responding to litigation, most of which focuses on procedural matters. This has thwarted our efforts to take up new initiatives to manage and reduce bycatch and protect important fisheries habitat. We have a very transparent process that relies on the participation of all sectors of the public. Again, unfortunately, much of the litigation we are addressing comes from special interests that have decided to not participate in this very public forum. Apparently, they prefer to go to court, and then get in a closed room and conduct backroom negotiations with federal attorneys. Away from the public eye. Away from the science based deliberations that Congress intended when you established the Magnuson Stevens Act and NEPA, and the other relevant statutes.

General Fisheries Management Issues

I believe that the current system, a collaboration between the Regional Fishery Management Councils, NMFS, and the states is the appropriate process for management of our Nation's fisheries resources. When it is carried out properly, this process has all the ingredients for responsible decision-making. It is based on science. It is deliberative. It is transparent. It is representative. And, where it has failed to meet the conservation test, it is not because of the structure, but because of implementation. With regard to the National Marine Fisheries Service, there are several levels of review ongoing relative to NMFS' organizational structure and its ability to meet mission requirements under multiple authorities. I believe that Dr. Hogarth is working hard to address the problems facing the agency. Rather than focus on organizational structure of the agency, or specific budget and management processes, I would like to provide my thoughts on a few overriding issues relative to the collective Council/NMFS management process. I believe these are fundamental problem areas that you should be aware of that are impeding our ability to collaboratively accomplish our management mission. I also want to point out that several of these issues are discussed in the comments of the Council Chairs regarding MSA reauthorization, which I have attached to my testimony for your information.

Litigation gridlock

Litigation is currently the most pressing problem facing the agency, and attempting to gird our process against this litigation is threatening to cripple our management process. Because of conflicts regarding procedure under various statutes, the door is open to often frivolous lawsuits over procedural issues, which have the perverse effect of thwarting necessary conservation action. While judicial remedy should be available to address real shortcomings in our management programs, the Catch-22 is that we have reached a point where litigation is seriously impeding our very ability to effectively manage our fisheries and comply with Congressional direction. Whether this is by design, or an inadvertent result, I can't say. I can only note that the very interest groups who are calling the loudest for dismantling the Council process are often the same groups engaged in these procedural lawsuits.

For example, there has been a dramatic trend in litigation to exploit the mismatch between NEPA and the Council process, and circumvent the very public process envisioned by this and other Acts, by attempting to use the courts to achieve their desired end game, rather than participate directly in the Council process. Settlement negotiations between NOAA attorneys and plaintiffs, which often follow, further circumvent the process by avoiding the deliberative, public processes envisioned under all of the Acts. In some cases, litigation ostensibly aimed at conservation objectives has actually impeded implementation of conservation measures recommended by the Councils. Essential Fish Habitat (EFH) is a prime example, where several of the Councils' proposed EFH amendments (intended to comply with the 1996 Sustainable Fisheries Act), were challenged as inadequate. As I understand it, the plaintiffs were successful under the NEPA claim that the EIS was deficient. The net result of this litigation and attendant settlement negotiations is at least a three

year delay in implementation of amendments which would have defined and provided protection for EFH and Habitat Areas of Particular Concern (HAPC), while the Councils and NMFS undertake development of a new and comprehensive Environmental Impact Statement to implement EFH protections.

Similarly, the North Pacific Council and NMFS have been, over the past three years, attempting to develop a comprehensive, programmatic-level EIS for our groundfish Fishery Management Plans. Through court orders and settlement negotiations, where plaintiffs are attempting to directly influence the outcome of the EIS process, completion of that EIS has been delayed for at least an additional year, more likely two. The Council and NMFS devote thousands of hours of valuable, limited staff resources to these litigation-driven exercises, compromising our ability to focus time and resources to address real management and conservation issues. It is further frustrating that many of the groups who are criticizing the current fisheries management process have not attempted to participate in that process; rather, they have simply turned to litigation as their primary means of influencing fisheries policy and regulations.

Conflicting Acts

Among the recommendations from the Council Chairs is the need for clarification of the authorities and requirements among the primary Acts governing our process. The Magnuson-Stevens Act (MSA) outlines a process for public participation, extensive supporting analyses, and public participation that is similar in scope to that outlined under the National Environmental Policy Act (NEPA). However, there are some fundamental differences between these Acts, and some fundamental mismatches between the fisheries management process outlined under MSA and the process requirements under NEPA. It is these process requirements under NEPA that most often provide for litigation opportunities, regardless of the validity of the underlying science or the completeness of the analyses which support a proposed management action. And more importantly, often times despite the conservation benefits of the proposed action as well. It appears that the process and requirements for fisheries management plans and amendments as outlined under MSA satisfies most of the letter of NEPA and certainly all of the intent of NEPA, relative to analysis, public participation, and ultimately, environmental conservation. The attached Council Chair's recommendations contain specific reference to this issue, and proposes clarification that failure to comply with NEPA in the management of a fishery under MSA should result only in judicial guidance regarding NEPA compliance, rather than judicial management of, or injunction against, a fishery unless there is a clear MSA violation.

In addition to the litigation opportunities for procedural lawsuits under NEPA, there are some additional problems which result from our attempts to comply with both statutes. In the North Pacific, we are currently in the process of altering our annual quota-setting process so that establishment of Total Allowable Catch (TAC) levels will go through a complete and formal rulemaking process under NEPA, including lengthy public comment periods at both the Council level (before final recommendations by the Council) and the Secretarial level (in reviewing the Council's recommendations). Currently the Council sets quotas each fall for the upcoming fishing year, based on just-completed scientific survey data. One of the keys to success in avoiding overfishing is to use the most up-to-date scientific information to judge the health of fish stocks and adjust harvest accordingly. Under the proposed change, which is being suggested by NMFS to comply with NEPA procedural requirements, quotas would be set on year-old survey data rather than on the best, most recently available scientific information, as mandated by the MSA. This is one example of a perverse, and presumably unintended consequence of the literal application of NEPA procedures to our management process.

Our Council is currently attempting to conduct an independent legal review of issues surrounding the intersection of these various Acts, including MSA, NEPA, and the Endangered Species Act (ESA). We hope that this legal review will better inform us how to balance the requirements among these Acts, as well as clarify NMFS and the Councils' respective roles in promulgating management measures under these Acts.

Regulatory Streamlining

NMFS has recently undertaken what is being labeled "regulatory streamlining", in an attempt to ensure that all proposed fisheries management programs are legally consistent with the provisions of the Acts mentioned above, as well as other applicable laws. One aspect of this initiative would require all Fishery Management Plans, or amendments to those plans, to illustrate full compliance with NEPA and other laws prior to action by a Regional Council. NMFS hopes that this will better

enable the Councils to make informed decisions and will, ideally, better enable the agency to defend these decisions against potential litigation. However, given the unique nature of the Council process, coupled with the process requirements under NEPA, there are concerns whether this initiative will ultimately be successful without some clarifications as to the relative applicability of NEPA vs applicability of the MSA. Again, the Council Chair recommendations contain specific reference to this concern, and suggest a potential remedy which would help define a more reasonable application of NEPA to our process, without jeopardizing the underlying environmental conservation objectives of this Act or the MSA.

Conclusion

There have been allegations recently that the Regional Council system is ineffective at addressing conservation objectives of the Magnuson-Stevens Act, and even suggestions that the Council system should be scrapped altogether, or, limited to only allocation decisions. This is a seductive bit of sloganeering that ignores some of the most fundamental lessons of fishery management. Much of the business of managing fisheries involves both conservation and allocation, and more often than not allocation and conservation issues cannot be separated. While some regions have been more successful than others at implementing the baseline, conservation oriented management measures necessary to preserve and sustain these valuable resources, the Council process can work effectively to address both conservation and allocation issues. I can cite numerous examples of where our Council has taken the lead and approved conservation measures above and beyond that deemed necessary based on agency advice. These include the Pacific ocean perch rebuilding plan; the Southeast Alaska trawl closure; the 2 million mt OY cap in the Bering Sea; Bering Sea closures to protect depleted crab stocks, and the closure of the Aleutian Islands pollock fishery. I submit that fisheries in the North Pacific are a shining example of the ability for this process to directly address conservation objectives, and balance the allocation objectives that often come into play. It is this collaborative process between the Councils, the Department of Commerce, and the public that the drafters of the Magnuson-Stevens Act envisioned, which allows for an informed group of stakeholders and managers to craft fisheries regulations that take into account specific regional considerations.

This is not to say that our system is perfect by any means, or that there is not room for improvement. There are a number of issues we still need to address, such as fishery rationalization in our remaining open access fisheries, and the effects of such programs on conservation and communities, as well as the immediate distributional effects on participants. We need a greater understanding of ecosystem processes to allow us to manage with more of an ecosystem perspective. We need to continually engage in self assessment of our science programs, and our management strategies. And, we need to make the system more user friendly so that a broad cross section of stakeholders is engaged in a transparent process. We need to solve the conflicts among statutes to cut the chain of paper chase litigation so we can focus on the business of managing our marine resources in a responsible manner. NMFS, with input from the Councils, is working hard to achieve a more efficient regulatory process, and to ensure that our fisheries plans and regulations meet the tests outlined by various Congressional statutes. I believe this process is improving, and we stand ready to respond to any directions that come out of the Magnuson-Stevens Act reauthorization process or other Congressional actions. Again, I appreciate the opportunity to speak to you today on these issues. Thank you.

Senator KERRY. Senator Wyden has to leave, and he just wanted to make a quick comment before he does.

Senator WYDEN. Thank you for your thoughtfulness, Mr. Chairman. As you and I have talked about, the West Coast groundfish industry has just been flattened, and Senator Gordon Smith and I have a buyback bill. The Senators from Washington and California, are very interested in this. I would just like, in addition, to be able to pose some questions to Dr. Hogarth in writing. I would just like to see if we can work it out so that sometime between now and the end of the session, the West Coast Senators could get a hearing on this buyback question for the West Coast, because all of us are very concerned about it. Senator Smith and I have worked in a bipartisan way and—just the way you and Senator Stevens have.

Senator KERRY. Let me just say to the Senator, it's my hope that we're going to have a significant buyback program coming out, perhaps even from this hearing. Among the questions I want to ask about today is some loan structure buy-back through the industry that some people are talking about, and various ways we might approach it.

However, we've got to do this soon. We can't wait around on this, because the funding process is going now. I want to get an authorization done as rapidly as we can through this Committee, and I hope I can have the cooperation of this Committee in trying to do that.

Senator STEVENS. Mr. Chairman, if I might suggest to you, we should explore the concept of the Farm Bill in extending financial assistance in times of shortage of fisheries in times of rebuilding fisheries, not necessarily taking boats out as much as giving them the ability to survive while we're rebuilding the species.

Senator KERRY. I completely concur with that. I'm not sure, given the vote yesterday, what the vehicle is but I think that's a terrific way to go at it.

So, Senator Wyden, your questions will be submitted in the record. I'm going to leave the record open for a week. All of us, I think, will have written questions, because I don't think we'll get through all of them here, but there are some serious questions we'd like to expand the record on so this is a complete hearing.

Dr. Hogarth, if you'd come back—and we'll just do a quick round, series of rounds, here. First of all, to do the things you talked about—and I agree with them; I think they're a terrific set of recommendations, ranging from the monitoring to dealing with the burdensome management; we'll get to some of the details of that in a moment—what's it going to take, financially? What do you need to do this job? Let's put it on the table as directly as we can. What's it going to take?

Dr. HOGARTH. In my opinion—this doesn't represent the Administration—from my opinion, to modernize the agency will take about \$500 million over the next 5 years. And that's what we're sort of looking at internally.

Senator KERRY. The \$100 million for this year would be an addition to what's already been allocated?

Dr. HOGARTH. Right. That's correct. And this is based on some of the studies that have been done of the agency by way of looking at the observer needs, the annual surveys. For example—well, Senator Wyden has left, but we do a survey on the West Coast, the West Coast groundfish, approximately every 3 years to manage the stock like that, which should be done annually. And we need increased stock assessment work and, you know, that type—

Senator KERRY. Monitoring and so forth. Well, I concur completely. I think we need to lay it on the line, and I hope you'll put that request to OMB and to the Administration through Secretary Evans, who I talked to earlier, as I said. I think he's prepared to try to fight for more.

Dr. HOGARTH. The other thing in buyback, Deputy Secretary Sam Bodman had asked me to look at buybacks—and we're looking at that. It's just a little bit more complicated, but we're trying to

take the fisheries nationwide and put them in some kind of priority and then look at what we think would be a sustainable fishery.

Senator KERRY. Well, may I say to you, having been at this for as long as I've been at it, if you want to have a political science study in state, local community, federal interaction and in the difficulties of managing something, here it is. Fisheries provide about as diverse a set of circumstances—we're not a single-species fishery, nor a single methodology, so the competition between one type of fishing versus another and everybody having an impact on each other—the draggers, the scallopers, the long-liners, and—so forth—makes things enormously complicated.

In the end, it's a competition over who's going to have access to the fish for what period of time to get sufficient revenue. That's the fight. One of the reasons I think Alaska's been so successful is they've taken part of that fight off the table. We're left floundering around without that.

I think the buyback is the only fair and sensible way to try to come out of it. You've got to have some access limitation, then the struggle starts to go away and people know what to expect. The consensus is built more easily. I urge you to embrace this as rapidly as possible, because this Committee, I am determined, is going to try to come up with some kind of program fairly soon. I think there are ways to do it with enforcement. There are ways to do it fairly. There are ways to grandfather certain people—longevity, other kinds of standards that can be applied and it's a choice fishermen can make themselves to a certain degree. But I think we've simply got to find a way to implement it, and I hope you'll support that.

Dr. HOGARTH. Personally, from my standpoint, I do. I don't know what the Administration's standpoint is. But I think the number-one issue, in my opinion, in most of the fisheries, except Alaska, when you're dealing in billions of pounds, when the rest of the country is dealing in millions of pounds, is that we have got to tailor the capacity to the resource, and we've just got to do it.

I mean, there's right now in this country an estimated billion pounds of shrimp, frozen, due to imports and the competition with the fleet that we have, that's probably about 50 percent over capacity right now. We have that throughout. The West Coast groundfish, the fishermen themselves have given us a proposal for buyback, for buyout on West Coast groundfish, saying that they've got to reduce tremendously the number of vessels in the fishery. So we've got to, if we're going to make—

Senator KERRY. Can you tell me how much the judge's court order has decreased effort in New England?

Dr. HOGARTH. To address latent effort in the groundfish fishery, a used days-at-sea (DAS) baseline was determined based on the highest amount of DAS fished in any one fishing year during the period of May 1, 1996 through April 30, 2001. Once the used DAS baseline was established for each vessel, DAS were reduced by 20 percent.

Senator KERRY. Will the Secretary and you recommend institutionalizing the removal of latent permits?

Dr. HOGARTH. In my opinion, all latent permits are removed from all fisheries.

Senator KERRY. Assuming the removal of latent permits is permanent, how much further reduction in effort would be necessary to meet the requirements of Magnuson?

Dr. HOGARTH. I think you've got to look at it fishery by fishery, because latent permits right now are not taking actual capacity out—the fishing that's taking place. Most of the latents are waiting to see, if the stock improves a little bit, they may join in. But many fisheries are going to actually have fishing capacity that's on the water taken out, and that's what we're trying to look at now, as to how much actual capacity needs to be removed from each type of fishery.

Senator KERRY. Can you tell me what you think the appropriate amount of fishing is, or the level of boats in our fishery?

Dr. HOGARTH. No, sir, because it's got to be fishery by fishery, and that's what we're looking at.

Senator KERRY. How long would it take you to make that kind of assessment?

Dr. HOGARTH. We are hoping to finish it within the next month. We're in the process now.

Senator KERRY. With respect to observers collecting fishery data, apparently in only 11 of 230 federal fisheries that are managed under the authority of the Magnuson do you currently have observers: 11 out of 230 federal fisheries. You have responsibility for monitoring an additional 25 category 1 and 2 state and federal fisheries, but we only have coverage in 7 of these fisheries. We have long, long urged the Administration to improve observer coverage. You heard Senator Stevens refer to the extensive coverage that they have, and Mr. Benton. What is being done to increase this coverage?

Dr. HOGARTH. Well, fishery by fishery we've asked for additional money, and we have gotten additional money each year.

Senator KERRY. Well, how much will it cost to provide adequate observer coverage nationwide?

Dr. HOGARTH. Over the next 5 years, NOAA estimates that approximately \$92.9M in additional funds will be required to meet the agency's immediate monitoring requirements and to facilitate and enhance compliance with existing laws, regulations, fishery management plans, Endangered Species Act section 7 consultations, and Federal court orders.

Senator Snowe.

Senator SNOWE. Thank you, Mr. Chairman, and I thank both of you for your comments here this morning.

First of all, as far as the buyback program, I hope we can create a national program with a national approach that will reassure the industries that are directly affected by these kinds of decisions. I would hope that instead of regionalizing this, we could have a national approach that the industry can count on. I think this is one of the most effective ways to mitigate some of the problems that come from these court decisions.

Dr. Hogarth, with respect to the New England groundfish industry, exactly what steps are going to be taken between now and May 26th? I would like to have a clear understanding of how the government's going to approach this issue. I know the states have intervened, requesting the judge to reconsider. And then I under-

stand you have until May 26th to appeal that decision in the event the judge chooses not to reconsider. So that we have a clear understanding of how you will be proceeding, please outline for me the actions that will be taken by the government, by the Department of Justice.

Dr. HOGARTH. Okay. We are now in the process of looking at the motions for reconsideration that the others have made, and we'll have to make a decision with Justice by tomorrow afternoon. And Justice is—you know, when we get to these type of suits, Justice has the final say-so. We make recommendations to Justice, but they make the final say-so. So that would be the first step, is tomorrow's decision as to whether reconsideration. Then the appeal, we will make a recommendation to Department of Justice on whether to—we should appeal or not. And there are some concerns about the judge telling us exactly what measures should be put in place. So we will make a recommendation to Justice. Justice makes that final decision.

Senator SNOWE. That is regrettable. Shouldn't you be making the final decision? There is a concern here on our part about who's going to make the final decision. It concerns me that there is this reluctance by the Administration to make this decision. Why wouldn't it appeal?

Dr. HOGARTH. The Solicitor General makes the determination.

Senator SNOWE. Right.

Dr. HOGARTH. Well, I guess it's not me to question the judicial system of this country. We have to abide by it, and we do our best. We do make recommendations and argue pretty strongly for the position that we think should be taken. And this is a very critical issue for us. You know, we went through mediation and we thought we had an agreement, plus—then having the judge to give us specific regulations, which we think probably should be remanded to us for consideration.

Senator SNOWE. Admiral Lautenbacher was pretty clear in last week's hearing that he certainly thought that we should appeal. I hope that sentiment prevails and is expressed in very strong terms to the Department of Justice. I think it's a real surprise that the judgment exceeded this settlement in a very restrictive way. These additional measures will represent a serious hardship to those directly affected by it, because we're talking about the average days instead of taking the maximum and the best year.

That's obviously one serious consequence that will prevent a number of people from being able to participate. Moreover, the expanded closures and the duration of those closures is another serious restriction. Were you surprised by the decision?

Dr. HOGARTH. Yes. After we went through the mediation, I was surprised. We were expecting a number of hours and then when it came back, yes.

Senator SNOWE. We certainly want to be involved in every way possible to ensure that we proceed in a timely fashion. I just hope that the Department of Justice is going to see to that decision and appeal the ruling in the event the judge chooses not to reconsider the decision.

In addition, I would like to hear your recommendations about how we can improve NMFS' management structure and decision-

making. I read your testimony and you've outlined a number of recommendations that might improve this decisionmaking process.

We obviously have to reverse this destructive trend toward litigation which is proliferating. When I was complaining about it a few years ago, it did not even compare to where we are today. So clearly something has to change.

I think, frankly, we've got to decide what recommendations are going to work, when they are going to be put in place, their timetable, and who's going to implement them. If it requires action on our part, we need to know that. We also need to know when you think you could be in a position to put these recommendations in place, because I just don't think we have any time for further delays. I think this is a huge crisis, and it's not going to dissipate anytime soon unless we choose to make a difference. I think, with your leadership, it is clearly possible to do so, but I know how things can work in bureaucracies. My fear is this will get bogged down.

There should be a sense of urgency about this, because we need to turn this agency around. I understand the burdens, the financial impacts, and the impact it has on the morale within the agency, when you have lawsuit after lawsuit. At some point we have to reverse course, otherwise we're just going to see no end to this.

Dr. HOGARTH. Senator, I agree. I think the agency, as a whole, has been under attack, the morale. And the people at this agency work hard. I don't think there's probably a person that works only 40 hours a week. And this is, it's affecting us greatly. And I think what we want to do is find a system, and I think everyone would embrace it.

The NEPA is one of the big problems. We've got to get those coupled so that we are not—right now, it's a process that can easily be sued because we can't get it in sync. And I don't know that—I personally feel that Magnuson-Stevens is an equal process. The only thing that could be changed there maybe is to make sure that there's a warning about having to look at a series of alternatives. That's one thing that the NEPA does that we may not be doing, you know, otherwise, is to have a good series of alternatives that the public has looked at and we've addressed. That accomplishes a lot of things. It accomplishes the fact that if you have to do a Section VII consultation, then you've already got the alternatives identified by the councils, and so when you do the Section VII or do a biological opinion, it's not a surprise to people what you're doing. So that makes the process frontloaded. It makes the people really involved.

But as the law is right now, and I think the council is another good example which they didn't mention. When we get through with this programmatic EIS we're doing, we'll almost immediately be back out of compliance, because then we'll have to go change the regulations. Then if you change it differently from what's in the programmatic EIS, then you've got to go back and, you know, manipulate it again. So we're almost on a do-loop. We just continue, you know, chasing ourselves. So I think we have to look at that process very clearly and try to streamline that somewhat.

Right now, for example, I hate to bring this issue up, because it hasn't been brought up, but the monk fish is another one, for ex-

ample. The council had made the deliberate decision, based on stock, that, as of May 1st, that stock was—you know, it could be zero days at sea. Well, doing the cooperative research with the industry, we found out the stock was in better shape and we could harvest. We had no mechanism to do it, because you had to go through an amendment to the council, go through a council amendment which takes 9 to 12 months. So now that's what we're doing, is trying to figure a mechanism to get that fishery to make a decision on if and how to open that fishery and what level of fishing. If it had been an over-fished stock, we could have done an emergency rule that would immediately close the fishery down. So we have to look at stocks that are improving, how can we react to that also.

Senator SNOWE. Is there a mismatch in the timetable? Is this the only problem related to NEPA and the council process? I know Mr. Benton described how this process was established, and how critics can circumvent the process and go directly to court rather than being directly involved in the council process.

Dr. HOGARTH. Well, I think that's one of the big issues. And don't get me wrong. I think we need a NEPA process. We need to make sure the public is involved. But I think the Magnuson-Stevens does a good job of doing that. With some tweaking there, I think we could get the timing a lot better.

We need to be making decisions on current data and not data that's, you know, 2 years by, and I think that's one of the big questions, that the fisherman are out every day, they think they see more fish. We agree there's more fish. But by the time you get it through the stock assessments, due to the number of people we have in the surveys, it is sometimes one to two years old. We need to make sure that we can get this process so it's timely.

Senator SNOWE. Okay, thank you.

Senator KERRY. Thank you, Senator Snowe.

Senator Breaux.

Senator BREAU. Thank you very much, Mr. Chairman. Thank you, gentlemen, for your presentations. There are some who would argue that the councils structure is a highly politicized operation, that whoever gets the ear of the Governor, through supporting the Governor or what have you, gets appointed to the councils. We tried to address this process back, Dr. Hogarth, in 1976. In fact, I had authored amendments to the process on trying to structure the requirements of being on a council that you had to have people who, by reason of their occupational or other expertise—scientific expertise or training—are knowledgeable regarding conservation and management of a commercial or recreational harvest of the fishing resources of their area.

We then added Subsection B, which said that, in doing that, that the Secretary in making these appointments shall, to the extent practicable, ensure a fair and balanced apportionment on a rotating or other basis of the participants on the councils. It's a hard thing to write. You've got to use your common sense here. We tried to write this back in 1976 in a way that said, look, the council's going to be a representative of everyone in the area. That means recreational fishermen and environmentalists and commercial fishermen, as well.

They tell me that, in the Gulf council, that of the 16 members of the council, only 2 are from the commercial sector. Now, if that is true, that, to me, does not represent balance by any way, any shape, or any form. Now, the Secretary has to approve these recommendations. He can disapprove them. I mean, do we do that? It seems to me that the Secretary is not assuring that there is proper balance. I mean, I've got recreational people in other parts of the country who say we don't have enough recreational representation on there. Now, when they sit in the council meeting, they don't have an "R" on their forehead or a "C" to identify which group they're representing, but it doesn't take a rocket scientist to figure this out.

How do we ensure that there's a proper balance? Are they going to—they're answerable to their constituents, just like we are. They ought to be making decisions in the national interest, but if you look at the councils, you can say what they're going to say before they say it, just depending on where they come from.

In the Gulf, I'm really concerned that what we have is not representative. It's not balanced. Can you comment on this whole question?

Dr. HOGARTH. Well, yes, sir. Last year, in fact, was the first time that Secretary Evans had been involved in this process. We wrote back to one state three times, and I called, I think, once, asking for additional names, because they were taking what appeared to be the commercial fishermen and replaced them with what looked like recreational, you know, from all the indications we had. The Secretary has no choice but to choose from a list that the Governor submits.

Senator BREAU. Yeah, but he doesn't—he can keep saying no until they—

Dr. HOGARTH. Well, you can leave—

Senator BREAU.—send a balanced list.

Dr. HOGARTH. You can leave the seat unfilled. That's correct. And we have discussed that. But then we feel like then you wouldn't be getting the representation from that state and that would be, you know, a fallacy—you know, would not be very good either.

Senator Stevens mentioned some language—there was some language that, I'll be honest with you, I wrote, that flowed among our regional administrators and then they got out as a draft. We were looking at a way to try to, find a way that the Secretary could have some more flexibility to make sure that we get well-rounded councils. That was the only thing—

Senator BREAU. Let me tell you, the law—I mean, this is the section I wrote in 1976 in Subsection B, says the Secretary making appointments under this statute shall, to the extent practicable, ensure a fair and balanced apportionment.

Dr. HOGARTH. And the Magnuson statement said that he will select from the list of names submitted by the Governor.

Senator BREAU. Well, yeah, but he doesn't have to select if they're not fair and balanced.

Dr. HOGARTH. We could leave the seat unfilled.

Senator BREAU. Or you can send to the Governor a strong note saying, "This is not fair and representative. I want someone that—

we need more recreational fishermen or we need more commercial fishermen." Make it very clear. The Secretary cannot take the position that his hands are tied. He does not have to approve a list that Congress has required be fair and balanced.

Senator KERRY. Senator, will you—

Senator BREAUX. Yeah.

Senator KERRY. We discussed that, as a matter of fact, that the Secretary could send them back. If the Governor sent that same name again up, that would be vacant, but he has the right to give the Governor a second chance.

Dr. HOGARTH. Yeah, and we've done that. But when the Governor has said that—continues to send the same names and saying, "I want—I feel like that my state deserves a recreation seat, you can look at other states to get your commercial seats if you want to," then we—get into that problem.

Senator KERRY. Let me interject here, Senator, if I can just for a moment—procedural, that's all.

We're going to have a string of four votes at 11:30, which is effectively going to undo whatever intentions we have to continue the hearing. So what I want to do is try to be able to get through as much as we can, in terms of both testimony and questioning, in the next—we've got about 40 minutes, 45 minutes, before the first vote really requires—

Senator STEVENS. Well, I'll be happy to forego any questioning. I just have one statement to make, and that is if you're proposing a buyback, you've got to presume limited entry. Everyone that's talking about buybacks doesn't understand them if they're not ready to have limited entry to begin with.

Senator KERRY. Right, absolutely. And that's, I think that's precondition.

Senator BREAUX. Where was I? Who am I?

[Laughter.]

Senator KERRY. You were berating him for not having the Secretary adequately—

[Laughter.]

Senator BREAUX. Oh, yeah. I remember now.

Senator KERRY. And I rescued him, and he was thrilled that we were moving on.

[Laughter.]

Dr. HOGARTH. Well, Senator, we're in that process right now, and I will take those words to heart.

Senator BREAUX. You all are the only ones to assure that there's balance. The Secretary is the person who has to make sure that the councils are balanced. I would suggest that in the Gulf council, if what I have is anywhere close to being accurate. It is clearly not balanced, and it should be. I want it to be balanced.

Final point—IFQs, individual fishing quotas. And I know different members, Senator Stevens has a different opinion, from an Alaska perspective. What is the position of your office with regard to the establishment of individual fishing quotas on a regional basis? What works in the Gulf may not work in Alaska, it may not work in New England, and shouldn't be imposed upon them. But my point is that if a region thinks that IFQs are a reasonable man-

agement tool, do you think they ought to be able to be allowed within the region that thinks it's a reasonable management tool?

Dr. HOGARTH. Yes. It's our opinion that the moratorium on IFQs should be removed and we should let the councils have the responsibility, on a regional basis, to do that.

Senator BREAU. It shouldn't be mandatory?

Dr. HOGARTH. It shouldn't be mandatory.

Senator BREAU. Okay.

Dr. HOGARTH. No, sir. Can I answer one thing real quick, because I think I did not give you a good answer about the balance. And there's also a real question about what is balance. A lot of people will argue that the Gulf council is more recreational than it is commercial, so therefore they should have more recreational seats. We seem to be talking about recreational and commercial. We don't talk about academia and environmental as much and, general public that likes—that has really an input into this—

Senator BREAU. It's a very difficult challenge. I agree. Thank you.

Dr. HOGARTH. Thank you.

Senator KERRY. Dr. Hogarth, thank you very much. Senator Stevens has agreed to forego his time right now.

Senator STEVENS. I'll only make one statement, Mr. Chairman. I remember so well, as the Republican Whip, going to a fundraiser for a young Democratic Senator from Louisiana, and you've just heard why.

Senator BREAU. Thank you, I think.

[Laughter.]

Senator KERRY. We're not allowed to discuss fundraising here in this building.

[Laughter.]

Senator KERRY. I was going to ask whether you're offering to go again, but I won't.

[Laughter.]

Senator KERRY. May I say this, Doctor, we will leave the record open. There are additional questions. I have a number of them here.

But let me just say to my colleagues, we're going to move on this. I want to get this reauthorization moving—it's been sitting around since 1999. It's time to get it done and I'm asking your cooperation, if I may, over the course of the next month. I hope next month we might be in a position to try to move to a markup on that, and I want to try to move a buyout bill separately with the hopes that we might be able to get that into the farm amendment or somehow work it in in a way that makes sense. But, likewise, we're going to try to move on that fairly rapidly.

So I enlist all the parties that are here interested, we're going to be pushing on this very hard over the course of the next weeks to see if we can try to draw the best of the recommendations on how we streamline it. I'm of the opinion, with respect to the Magnuson-Stevens Act, that the fundamental structure is sound.

We want this to be a democratic process. We know there are regional differences. We've taken this into account through the years. It's fundamentally sound, but there are these problems of the cross-regulatory, out-of-sync, requirements and all these other things.

We can address these. We can absolutely word specific with respect to issues about who's supposed to do what. We've learned enough about it to know how to refine this fairly rapidly, I think. I don't think we need some whole new reinvention of the wheel here. If you look at the Alaska experience, it is that a testimony to the fact that this can function. I think it needs some good tweaking and hopefully we can all get together and do that in the course of the next weeks. So we ask your cooperation on that.

Dr. HOGARTH. You will have it one hundred percent.

Senator KERRY. Thank you.

Dr. HOGARTH. And we agree that act is a good act that needs tweaking. That's all.

Senator KERRY. Thank you very much, sir. Thank you.

If I could ask the second panel to come up as rapidly as we can, I want to try to maximize the next half hour.

Thank you very much, all of you, for your patience. We look forward to your testimony. We're going to ask each of you, if you would, to summarize within the 5-minute period of time. We want to try to have time for questions. We will allow everybody to testify before there will be any questions.

And, Mr. Kammer, we'll begin with you. Thank you.

STATEMENT OF RAY KAMMER, CONSULTANT

Mr. KAMMER. Thank you, Mr. Chairman. Good morning to you all.

Senator KERRY. If I could just say, I'm going to go with Mr. Kammer and then Mr. Gutting, then Ms. Iudicello, and then Ms. Dalton. Thank you.

Mr. KAMMER. I'm Ray Kammer. In the past 12 years, I've had a variety of management and review experiences with the National Marine Fisheries. In the year 2000, the Deputy Under Secretary of NOAA, then and now, Scott Goodes, and the Assistant Administrator of the National Marine Fisheries Service, then Penny Dalton, to my left, asked me to do a management review of the National Marine Fisheries Service. The executive director was Carol Bellew, and we were asked to review the adequacy of funding, the ability of the Marine Fisheries Service to comply with its mandates, and the impact of litigation.

Our findings and recommendations are summarized in my longer testimony. Our conclusions were that the NMFS did not have the people, funds, or flexibility to conduct an adequate program and meet their mission. We recommended six major steps—base budget analysis systems, such as recommended by a NAPA study that was in the same timeframe; institution of a system of regular external independent program reviews; bringing constituents into planning and budgeting; preparing for coming retirements; fill vacant SES positions; and increase resources by \$186 million on an annual basis.

Partially in response to the recommendations of this report, Congress, indeed, did increase the NMFS major budget account by \$214 million in Fiscal Year 2001. Of that 214, 109 was responsive to our recommendations.

The management priorities that I recommend that NMFS focus on in the near future are to continue to organize and conduct pro-

gram reviews, to establish a regulatory calendar and make it available over the Internet to the public, implement simplified and uniform regulatory procedures in all 8 regions, and reduce layers of review, establish routine and continuing analysis of all litigation to identify trends and opportunities for improvement; and, finally, to establish an annual program of external reviews of the NMFS programs, perhaps by some combination of the NRC and NAPA.

This has been discussed by others. There are 7 major laws that have a significant impact on NMFS operations, but there are over 100 other pieces of, not just substantive legislation that governs NMFS activities, but also executive orders that give instructions to the National Marine Fisheries Service.

The reconciliation of all of these laws falls to the NMFS. And the sense that the Fisheries Service always has is as each of the individual pieces of legislation or executive order instruction, it should be dealt with as a top priority. Well, you can't have 100 top priorities. It just doesn't work.

I believe NMFS's ability to meet its mission would be enhanced if Congress were able to articulate one set of priorities for the Fisheries Service and simplify the procedures for achieving fisheries objectives. Therefore, my recommendation is that Congress, the Administration, the states, the councils, all the other stakeholders begin discussing priorities among the fishing objectives with a view toward providing a legislative guidance to the National Marine Fisheries Service to improve operations.

Senator KERRY. We appreciated that very much, and I appreciate your study very much.

[The prepared statement of Mr. Kammer follows:]

PREPARED STATEMENT OF RAY KAMMER, CONSULTANT

Mr. Chairman and Members of the Subcommittee, I am Ray Kammer. My experience with the National Marine Fisheries Service includes an assignment as the Deputy Under Secretary of NOAA from 1990 to 1992, leadership of a management review in 2000 and current service as a consultant to a panel of the National Academy of Public Administration that is reviewing the NMFS under a charge from the House and Senate Appropriations Committees. I am appearing before this Subcommittee in my personal capacity and only I am responsible for my opinions.

Overview of Recent History of U.S. Fisheries

In 1976, Congress passed the Magnuson Fishery Conservation and Management Act. The objective of this Act was to resuscitate a declining U.S. fishing industry and supplant foreign fishermen in U.S. waters. The Act was hugely successful. The collaboration of the eight Regional Councils and the NMFS succeeded in expanding U.S. commercial and recreational fishing and making the fisheries in the 200-mile exclusive economic zone a U.S. prerogative.

By the mid 1980's over fishing began to occur. The over fishing and the consequent actions to remediate created concerns over conservation, the environment, and economic and social impacts on communities and fishermen. These concerns manifested themselves in legislative instructions to the NMFS which culminated in the Sustainable Fisheries Act that renamed the MFCMA as the Magnuson-Stevens Act and established more explicit standards for national resource protection and added standards for consideration of community impacts, bycatch and protection of essential fish habitats.

Management Review of NMFS

The challenges that the NMFS must address are daunting. In 2000, the Deputy Under Secretary of NOAA, Scott Gudes, and the Assistant Administrator for NMFS, Penny Dalton, asked me to lead a management review of the NMFS. The Executive Director of the study was Carol Ballew. We were asked to review the adequacy of

funding, the ability of NMFS to comply with its mandates and the impact of litigation on NMFS operations. We found the following:

- The NMFS budget situation is misleading—NMFS has grown but management has little flexibility to direct funds into needed supporting research

The NMFS Operations Research and Facilities budget grew from \$282M in FY 1996 to \$421M in FY 2000

In that same time period external grants grew by 100 percent

The non-salmon internal budget grew by 7.2 percent—NMFS missed \$32M in adjustments to base

Programs, Projects and Activities doubled to \$105M in 113 separate instructions

- The causes of NMFS' management difficulties are not complex

No adjustments to base

Lack of support for non-salmon base

Litigation costs

Increased workload

Lack of effective planning

Weak budget and management processes

- Litigation is hamstringing NMFS

Before 1997 NMFS had 16 open cases—it was over 110 in 2000

70 percent of FMP's (25 of 41) have EIS' over 5 years old

5 percent of ESA listings are complete—have a recovery plan, have critical habitat designation, have delisting criteria

The costs of increased litigation are not funded—this diverts scarce staff and other resources into court cases

NMFS is the fourth largest regulatory regime in government (EPA, FAA, FCC)

No uniformity in creation of regulatory records across the 8 NMFS regions

Paperwork is ad hoc—it is not unheard of to find conflicting opinions in a regulatory case file

- Each regulatory decision endures eleven levels of review within NOAA

We concluded that the NMFS does not have the people, funds or flexibility to conduct a credible program consistent with its mission and recommended six major steps:

- Adopt a base budget analysis system based on the recommendations of a 2000 NAPA study
- Institute a system of regular external, independent program reviews
- Bring constituents into planning and budgeting
- Prepare for upcoming retirements
- Fill vacant SES positions
- Increase resources by \$186 for adjustments to base (\$32M), socio-economic analysis (\$10M), modern regulatory system (\$15M), stock assessments (\$100M), MMPS/ESA recovery (\$10M), enforcement (\$10M), and observers and cooperative statistics (\$9M).

Partially in response to the recommendations of this report, Congress increased the NMFS major budget account by \$214M in FY 2001. NMFS has developed and continues to develop and implement plans to respond to the recommendations of the report.

Management Priorities for NMFS

In my view, success for NMFS will be achieved through incremental progress on many fronts. I recommend that NMFS management focus on five actions that will simplify and inform NMFS operations:

1. Continue to organize and conduct program and budget reviews. The 50 percent increase in FY 2001 requires that priorities be set and implemented.
2. Establish a regulatory calendar and make it available over the Internet to the public. The complexities of the NMFS procedures make them impenetrable to their constituents.

3. Implement simplified and uniform regulatory procedures in all eight regions and reduce the layers of review. There is a Regulatory Streamlining Project now under way in NMFS.
4. Establish routine and continuing analysis of all litigation to identify trends and opportunities for improvement. The NAPA study now underway will present NMFS with a baseline of litigation analysis.
5. Establish an annual program of external review of NMFS programs and operations, perhaps by NAPA and NRC. External review can inform NMFS management of opportunities for improvement.

Simplification of NMFS Legislative Instructions

I can identify 7 major laws that have a significant impact on NMFS operations:

1. Magnuson-Stevens Act as amended by the Sustainable Fisheries Act
2. National Environmental Policy Act
3. Marine Mammal Protection Act
4. Endangered Species Act
5. Coastal Zone Management Act
6. Marine Protection, Research and Sanctuaries Act
7. Regulatory Flexibility Act

While each of these laws is important, each has a separate focus and a separate legislative mandate. There are more than 100 pieces of substantive legislation mandating NMFS activities, as well as Executive Orders governing the NMFS regulatory process. The reconciliation of these laws and instructions falls to NMFS with a sense from the different laws that each assignment is a top priority. I believe that NMFS' ability to conserve the fisheries, protect the environment, promote U.S. economic interests, encourage recreational fishing and address socio-economic issues would be enhanced, if Congress were to make a statement of its priorities for the U.S. fisheries and simplify the procedures for achieving U.S. fisheries objectives.

My recommendation is that the Congress, the Administration, the States, the Councils and interested parties representing the environment, U.S. commercial fishing and recreational fishing begin discussing priorities among U.S. fishery objectives with a view towards providing legislative guidance.

Mr. Chairman, Members of the Committee, thank you for inviting me to testify.

Senator KERRY. Mr. Gutting?

STATEMENT OF RICHARD E. GUTTING, JR., PRESIDENT, NATIONAL FISHERIES INSTITUTE

Mr. GUTTING. Thank you, Mr. Chairman. I am Dick Gutting, president of the National Fisheries Institute.

The institute is a trade association. We represent companies throughout the United States in the fish and seafood industry. Our members operate vessels, they grow fish on farms, process, import, export, all the way through the distribution chain up to the retail. Our members either harvest or sell all of the products from the fisheries managed by the National Marine Fisheries Service, so we have a lot at stake in how they do their job. And we're committed to ensuring that we have sustainable fisheries and that the American consumers will continue to have a safe and ample supply of seafood.

I think the importance of seafood for Americans is evident in the rising consumption. A fellow up in the State of Massachusetts, Dr. Bill Costelli, at the Harvard Medical School, told me several years ago, "Dick," he said, "eating fish is good for you, and you ought to eat it at least twice a week," and I believe him. And I think as more Americans learn about the benefits of fish and seafood, that demand is going to increase.

I think we've—I hope you've heard that conservation of fisheries is not a failure, that we are making progress. Senator Snowe, I was

up in the State of Maine yesterday and talking to the fishermen up there, and I saw a chart—it's a big "U," showing the biomass in groundfish. Low point, 1994. And look at that upwards sweep. Conservation works. And we're very grateful to everybody in this system who has been responsible for the success we're beginning to have. And we believe that conservation has to continue to be our highest priority.

Fisheries, however, are more than fish. They also involve the fishermen and the fishing communities that depend on them, and this is where our concern lies with the National Marine Fisheries Service and its programs. Over time, the agency has narrowed its mission from maximizing benefits from ocean resources to protecting those resources from users.

Consider the agency's goals in the NOAA plan: recovering protected species, sustaining healthy coasts, building sustainable fisheries. These goals sound fine. But compare them to the Department of Agriculture. There was some talk about the Department of Agriculture. What are their goals? Well, first of all, the Department of Agriculture calls itself "the people's department." Its core mission is helping farmers feed America and the world in a sustainable way. Guiding principle: customer service. Goals include a strong farm economy, promoting public health, enhancing the capacity of communities to prosper. Different words. And those different words reflect this drift toward protectionism that I mentioned.

Where did this come from? It came from a lot of often complex and inconsistent statutes. It came from long periods of time when the agency didn't have leadership, and it came from pressures from various outside groups. And what have we wound up with? Well, we've wound up with an agency which has a persistent them-versus-us attitude, where there's increasing confrontation and litigation, where there's loss of community support, demoralized agency staff, and deteriorating agency services.

Agency credibility is now under persistent attack in the media by groups who are jockeying to replace National Marine Fisheries Service as the authoritative voice on how our fisheries are doing. Their message to the American people is, "Trust us, not them." And, unfortunately, until very recently, the National Marine Fisheries Service seems to be unable to respond and counter these attacks.

And these media campaigns are being followed up with courtroom battles. Resulting building in litigation is diverting agency resources from future planning to the defense of past actions. Lawsuit settlements only seem to encourage more litigation. And agency policymaking seems to be driven now by litigation strategy and not good science.

The agency hesitates. Should it encourage seafood farming, or restrict it? Help improve the quality and safety of seafood, or leave it to others? Encourage the greater use of available resources, or leave them in the water? Should it partner with the fishermen, or go it alone?

Internal debates go on and on, and the agency's bogged down. Documents are edited repeatedly in internal review processes that can take years to complete. Programmatic offices are balkanized. And, unlike the U.S. Fish and Wildlife Service, and, unlike the

U.S. Coast Guard, there's no systematic training program for people in the agency. This is a deficiency that's going to become more and more critical as the experienced managers leave the agency.

Now, developing a proactive agency is going to take a lot of work. It's not something that can be done in a weekend brainstorming session or with the enactment of a new law. It's going to take a long-term commitment and a refocus of programs. People need to be trained and educated. And somehow, the litigation cycle has got to be broken.

The benefits, if we can pull this off, I think, are substantial. They include better conservation, professional fleets, modern processing facilities, a vibrant and new ocean aquaculture industry. It would be an agency where we could enhance stocks using modern technologies, and we would—it would be an agency where there would be a creative use of fishing opportunities and transitional assistance to help the communities that are going through a difficult time.

Senator Snowe, I met with fishermen last night in Maine. They are numb. They are in shock. There is despair. Where a few months ago, there was optimism, now people seem to be walking around in a daze.

I think we can turn it around. I thank the Committee for holding a hearing like this. It's hearings like this that I think are going to make a difference. Thank you.

Senator KERRY. Thank you very much, Mr. Gutting. We appreciate it.

[The prepared statement of Mr. Gutting follows:]

PREPARED STATEMENT OF RICHARD E. GUTTING, JR., PRESIDENT,
NATIONAL FISHERIES INSTITUTE

Thank you for the opportunity to testify on the programs of the National Marine Fisheries Service. I am Richard E. Gutting Jr., President of the National Fisheries Institute (NFI).

The NFI is a trade association representing companies throughout the United States in the fish and seafood industry. We are a "water to table" organization, with member companies located throughout the distribution chain, from vessel operators, fish-farmers and those who supply them, to processors, importers, exporters, distributors, retailers, and restaurants.

The NFI is committed to the long-term sustainable use of fishery resources, and to providing Americans with an ample and safe seafood supply. Because our members harvest, process or sell the food produced from the fisheries regulated by the National Marine Fisheries Service, we have a vital stake in the agency's ability to conserve these fisheries.

The importance of this food to Americans is reflected in rising consumption. On average, Americans eat about 16 pounds of seafood each year. This compares to about 10 pounds per person in 1960, and 12.5 pounds in 1980. Recent scientific reports cite the unique nutritional and health benefits of eating seafood, and as Americans learn more about these benefits, consumer demand should continue to grow.

Despite the claims of some, fishery conservation is far from a failure. The NMFS recently reported to Congress that:

The size of many fish stocks around the country has begun to increase, while we have halted the decline of other stocks and have begun rebuilding them. This includes many of our most important species. The number of stocks with sustainable harvest rates rose by 45 percent between 1999 and 2001, and those with sustainable stock sizes increased by a third.

Achieving this level of conservation takes hard work, and we appreciate the efforts of the fishery management councils, fishery commissions, state agencies and NMFS, as well as the many people in our seafood communities who have volunteered their time and money for conservation.

Conservation must continue to be the highest priority. Fisheries, however, are more than fish, and while rebuilding depleted fish stocks is important, so also are viable fishing communities. What good is seafood if there is no one to harvest and process it for consumers? And how are the nutritional needs of Americans going to be met in the future, if people cannot use ocean resources?

Herein lies our concern. Over time, the agency has narrowed its mission from maximizing benefits from ocean resources, to protecting them from users.

Consider the agency's goals in the NOAA Strategic Plan: Recovering Protected Species, Sustaining Healthy Coasts, and Building Sustainable Fisheries. Now compare them with those in the strategic plan of the U.S. Department of Agriculture which refers to the USDA as "the people's department." There the core mission is helping farmers feed America and the world in a sustainable way, the guiding principles include customer service, and the goals include maintaining a strong farm economy, promoting public health, and enhancing the capacity of communities to prosper.

These differences in goal statements illustrate the agency's drift towards protectionism—a long-term trend resulting, in part, from a proliferation of complex and differing legislative mandates, lengthy periods of time with leadership vacancies, and pressures from various activist campaigns.

The results are harmful—both for the NMFS, and for the people who depend upon its services. They include:

- Persistent "them" versus "us" attitudes;
- Increased confrontation and litigation;
- Loss of community support;
- Demoralized agency staff; and
- Deteriorating service.

Agency credibility is now under persistent attack in the media by groups jockeying to replace the NMFS as the authoritative source of information on fisheries for the public. Their message is "trust us—not them." Unfortunately, the agency seems unable to defend itself and its conservation accomplishments.

These media campaigns are being followed up with courtroom battles. The resulting buildup of litigation is diverting agency experts from future planning to defense of past decisions. Lawsuit settlements only seem to encourage more litigation, and agency policy-making now appears to be driven more by litigation strategy and less by strong science.

The agency hesitates. Should it encourage seafood farming, or restrict it? Help improve the quality and safety of seafood, or leave it to others? Encourage greater use of available resources, or leave them in the water? Should it partner with fishermen to gather scientific information, or do it alone? Internal agency debates go on and on. In the meantime, opportunities are lost.

And the agency is bogged down. Documents are edited repeatedly in an internal review process that can take years to finish, and their incompleteness is used to avoid statutory deadlines. Programmatic offices remain balkanized. And unlike the U.S. Fish and Wildlife Service and the U.S. Coast Guard, there is no system for training to improve performance—a deficiency becoming more critical as experienced managers reach retirement age.

There are no easy solutions or quick fixes.

Developing a proactive agency culture requires more than a weekend brainstorming session, or the enactment of a new law. It will take a long-term commitment to strengthen needed core values and refocus agency programs. Investments need to be made in training and education to upgrade management and communication skills. Care must be taken in delegating regulatory power and in providing for systematic oversight of decisions. Somehow the litigation cycle needs to be broken.

The benefits would be substantial.

In addition to conserving fish, a vibrant proactive agency would help fishing communities maintain efficient and professional fishing fleets and modern processing facilities, and build a thriving and sustainable ocean-based aquaculture industry. It also would apply modern stock enhancement technologies to accelerate recovery of depleted stocks, help rationalize overbuilt fisheries with transitional assistance and the creative use of fishing opportunities, and help Americans more fully enjoy seafood by encouraging use of available resources.

Hearings such as this one can help. Thank you again for the opportunity to testify.

Senator KERRY. Ms. Iudicello?

**STATEMENT OF SUZANNE IUDICELLO, AUTHOR; MARINE
CONSERVATION CONSULTANT**

Ms. IUDICELLO. Good morning, Mr. Chairman and Members of the Subcommittee. I appreciate the opportunity to be able to talk to you today about the issues that we don't often spend time on in hearings, the nuts and bolts of management and implementation. Thank you for having this hearing. I think it comes at an important time, as everyone has said.

Since my statement will be included in the record, what I'd like to do is take the little time that we have and hit some issues that keep coming up among the statements of all the witnesses and you, yourselves.

First of all, I would like to say, as others have said, the system isn't broken. The system is functioning. Litigation is a part of our American system. We have three branches. Litigation occurs when the implementation of the law, or compliance with the law, isn't complete.

I think the changes to the Magnuson Act that occurred in 1996 were to put some concrete handles, timetables, measurable objectives on what had been, to that point, a very slippery business. Fishery management was totally discretionary. You couldn't hold people to task. Passage of the Sustainable Fisheries Act did that, and I think it is working. We've had 5 years, and if you look at the report that Dr. Hogarth gave a couple of weeks ago, the status of stocks is improving where there have been conservation measures in place in compliance with the law. There are fewer overfished fisheries. We know more about the status of stocks, about more of the stocks than we did a number of years ago. So I would say the system is working.

What's not always easy is integrating all of the mandates. You've heard a lot about the Endangered Species Act, about the National Environmental Policy Act. Yes, there are numerous mandates. They are not incompatible. There are some time line issues.

I had the privilege and the opportunity to work on NEPA compliance with Dr. Hogarth and Penny Dalton earlier and the people at the National Marine Fisheries Service, and I would like to second Dr. Hogarth's comment that they are some of the hard-workingest and creative and trying-to-do-the-right-thing people you can find. We had a number of workshops and sessions, both with staff and with the council, and with other agencies in the Federal Government who are resource managers and were sitting 10 years ago in the litigation tunnel that the National Marine Fisheries Service is sitting in today.

What you've heard about timing conflicts and lack of integration between NEPA, ESA, and Magnuson Act deadlines, I think, is not an insurmountable problem. I think that if there were some way to convene some really good minds from the Council on Environmental Quality, from the Department of Justice, from the general counsels' offices of the various agencies, and pull in the experience of resource managers who have gone through this before—and granted, that forest plans are not fishery management plans, if you're looking more at big ecosystem regional management plans, that could be like a forest plan over a longer period of time—I think you might have an opportunity to avoid this push and tug

of completing Els's and stock assessments. Magnuson says the agency must get the authorization for fishing out within a time certain, but NEPA says it must also go through all of this alternatives analysis. I truly believe there is a way to mesh these two.

So how do you do that? Dr. Hogarth didn't bring it up today, but I have heard him in many venues say, "I wish we could just have a moratorium. I wish we could just have a moratorium on litigation, on actions." It reminds me, if I date myself, of the old song "Stop the World, I Want to Get Off." I'd like to suggest that we stop the world because we want to get it right.

Now, certainly the Congress can't jump out and say, "No more lawsuits." But maybe the Congress, or maybe even the agency could say, "Two years, no more messing with the fishery management plans. Everything stays the way it is right now while we catch up. Let's breathe. Let's plan. Let's figure out where we want this system to be. Let's let the regions and the stakeholders articulate what success looks like and how we would evaluate it. Take a time out."

A lot of the changes to fishery management plans on a year-to-year basis are really minor and incremental. When you look at the monumental amount of resources that go into the public hearings and development the background documents, to bump the up a million here, a hundred thousand there, 25,000 there—it's insane. So why can't we just stop changing the plans annually and take a breather? Give it a try.

If that's not possible—and it probably isn't, but we could try—and you're look forward in the coming months to reauthorization possibilities, I would like to point you to some of the suggestions that came out of a year-long effort the Heinz Center sponsored and that was participated in by hundreds of fishermen, policy people scientists, academics and environmentalists. The project produced a book called "Fishing Grounds." At the end of that book there is a chapter called "Looking Ahead," and I think the best thing that the Congress can do is begin to articulate the national policy.

We don't need more prescriptive, detailed tinkering of time lines and this objective means this and that definition means that. We are looking to you to have the leadership in a national conversation that says, "What do we want our fishing future to look like? What do we want our communities to look like? How do we make that work for the smallest island in the Aleutians and for Cape Cod and for everywhere? How do we bring in what local people want to see as their future and say what the big national policies are and leave to the stakeholders and the councils to tinker the details to fit that?"

Thank you very much for the opportunity.

Senator KERRY. Thank you very much.

[The prepared statement of Ms. Iudicello follows:]

PREPARED STATEMENT OF SUZANNE IUDICELLO, AUTHOR;
MARINE CONSERVATION CONSULTANT

Good Morning, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify at this oversight hearing on management issues in the National Marine Fisheries Service. My name is Suzanne Iudicello; I offer my remarks today as an independent consultant in marine conservation. You have asked for views on several important management issues at the agency, including its litiga-

tion burden and the adequacy of the organizational structure to meet requirements under multiple statutory authorities. My observations on these topics are drawn from three activities in which I have participated:

- A project conducted for the National Marine Fisheries Service on requirements under multiple statutory authorities;
- The U.S. Fishery Management Program of the H. John Heinz III Center for Science, Economics and the Environment that produced the book *Fishing Grounds*; and
- Six years of service on the Marine Fisheries Federal Advisory Committee, MAFAC.

The focus of these observations is on NMFS's compliance with statutory requirements, particularly those of the National Environmental Policy Act, and whether the agency has the capacity in its budget, organization, structure and management processes to meet requirements under multiple statutory authorities and national policies. It is my view that the system for effective stewardship and procedural compliance exists, but isn't always implemented well. For the most part, the system does not need to be changed; the extent and amount of tools and resources we give NMFS to operate in the system, however, does require change. Finally, as the Subcommittee moves from its oversight role to legislative deliberations over the reauthorization of the Magnuson-Stevens Fishery Conservation and Management Act, there are some changes I recommend you consider. These lie not in the realm of nuts and bolts, ever more prescriptive details, or ratcheting down timetables, but rather in clarifying national policy and articulating what we think the future of fisheries in America should be.

Litigation is Part of the System, not an Indication That the System is Broken

Reading fishing industry publications and listening to the complaints and hand-wringing of officials and commentators over the past couple years, I get the impression there is an odd notion afoot in the land that we have somehow become a government of two functions, not three, and that the courts are no longer—or shouldn't be—part of the old “checks and balances.” I must respectfully disagree. Litigation, seeking redress in the courts, is part of our system, not an indication that the system is broken.

It is true that the system and the rules changed significantly in 1996, and that litigation over compliance with those rules has taken a heavy toll on the National Marine Fisheries Service. Many of the changes that were advocated by the conservation community in passage of the Sustainable Fisheries Act were precisely for the purpose of providing litigation handles on what previously had been a slippery, unaccountable and largely discretionary system. The law now includes specific targets, timetables, and concrete requirements to stop overfishing, reduce bycatch and protect essential fish habitat. It should not have come as a big surprise that when the new law's deadlines and targets were not met, advocates used litigation to hold the agency accountable, and that environmental groups are responsible for about a third of the action in the courts.

What is important to note about environmental group litigation is that while it may be new for the National Marine Fisheries Service, it is not new in the history of natural resource management. NMFS is about 10 years behind the U.S. Forest Service, National Park Service and other resource managers in suffering through litigation, particularly challenges to its analysis of the impacts of fishery management actions required in the Magnuson-Stevens Fishery Conservation and Management Act, National Environmental Policy Act, Regulatory Flexibility Act and various Executive Orders. The agency finds itself in what one NEPA expert has described as “Stage II” in the evolution toward compliance, a stage that occurs after numerous court orders and injunctions, where money is made available for contractors and consultations, detailed prescriptions emerge from general counsel, and the agency does enough to demonstrate that it is trying to respond to litigation. NEPA managers in these other agencies can tell you that what the Fisheries Service is experiencing now is familiar ground, and that there are ways to improve performance, comply with the laws, and get resource management done. We can learn from the experiences and approaches tried elsewhere, even if it seems at times the only relevant lesson is “you are not alone.”

The good news is that the National Marine Fisheries Service is no longer in “Stage I,” or denial that NEPA applies to fishery management actions. The agency has undertaken numerous activities to tap experience of other resource agencies, use the planning and brainstorming ingenuity of its own and council staff, and em-

ploy resources provided by Congress to expand training in NEPA and other procedural requirements, improve consistency in document preparation and get tough on the quality of decision record that will be approved.

This progress should not be thwarted by attempts to exempt the agency from NEPA or to declare that the Magnuson-Stevens Act public participation and decision process is equivalent to NEPA. The two laws are not inconsistent, and in fact are comparable in their policies. But the fishery management planning process and the environmental impact assessment process are neither the same nor redundant. The purpose of a fishery management plan or amendment is, at the most basic level, to authorize fishing. The purpose of an environmental impact statement is to provide decision makers and the public with a full exposition of the alternatives and consequences of authorizing fishing in the manner proposed in the plan. It does not seem unreasonable that decision makers at the council and in the agency would want to know the potential effects of a fishery management proposal on not just the target stock, but related fish, other animals in the ecosystem, the market, participating user groups, communities and so forth. And while fishery management plans do incorporate information about all these aspects of the human and natural environment, they do not provide the alternatives analysis that is the heart of a well-prepared EIS. Whether it is a vote by a council or final approval of a plan by the Department of Commerce, the fishery management plan process does not, without NEPA, provide a mechanism whereby the decision maker and the public can evaluate an array of alternatives and their consequences.

The difficulties in merging the respective steps of fishery management and environmental impact analysis lies, in my opinion, not in some incompatibility of the two statutes or processes, but in lack of clarity about roles and responsibilities for decision-making between NMFS and the fishery management councils. Who is the decision-maker? When is a proposal a decision? To what action does the alternatives analysis apply? How many alternatives? Are they alternatives to authorizing fishing or just alternative catch levels? Are there really alternatives if the council has already voted? Can the agency analyze alternatives the council has not put forward? These are not insignificant issues, and the agency has begun to tackle them under the leadership of Dr. Hogarth, who has made it clear to the councils that the documents they produce will be sent back if they don't pass muster.

Stop the World, I Want to get it Right

Dr. Hogarth has noted in numerous venues that he would like to call a time out, not just on litigation, but on council action, agency action, all of it, so NMFS could catch its breath and have a moment in which it was not responding to crisis. It reminds me of the old tune "Stop the World, I Want to Get Off." In this case, a better title might be, "Stop the world, I want to get it right." There are lots of ideas for doing a better job, there is just no time to flesh them out or test them.

Recognizing that litigation is part of our system, nevertheless, it does have the effect of trumping all other activity, not only for the agency, but for stakeholders. Once the agency is in court, it no longer has the flexibility to try different approaches, convene stakeholders for negotiation, or work with councils to improve background and analytical documents. If an organization is not a plaintiff or intervenor, it doesn't have a seat at the table or a role in crafting solutions. Once suit is filed, participants are either on the docket or on the sidelines. Not only does this not elicit diverse ideas, it sucks up agency resources that are desperately needed to conduct basic business, let alone plan ahead or think creatively to find ways to integrate disciplines and mandates.

In the past year, internal and external assessments, consultations, workshops and strategy sessions have generated notebooks full of ideas and possible approaches the National Marine Fisheries Service could explore to improve its performance under NEPA, the Endangered Species Act, Regulatory Flexibility Act and other mandates. Many of the suggestions are actions NMFS can implement itself, or in conjunction with general counsel at both NOAA and Department of Commerce levels. Some will require coordination and cooperation with the regional fisher management councils. Some ideas need more work and investigation. Other resource agencies and the Council on Environmental Quality have offered their experience and assistance in such endeavors, including technical assistance to better blend and find more flexibility in the timing requirements of environmental impact statement and fishery management plan development. This Subcommittee and its counterpart in appropriations have provided resources for responding to court-ordered document preparation and improving overall NEPA performance.

These actions are all to be commended, but they are not enough. At the risk of sounding as though more money is the only answer—and I don't believe it is—I must still observe that the resources provided the National Marine Fisheries Service

are not sufficient to meet the basic requirements of the Sustainable Fisheries Act, let alone be fully responsive to environmental and economic impact analysis required by NEPA, the Regulatory Flexibility Act, and Executive Order 12866 (economic impact of regulations). When Endangered Species Act compliance enters the picture, the resource burden is even greater, and the basic infrastructure is even farther behind the funding curve. For example, although agency and council staff and officials agree that having regular participation of staff from the Office of Protected Resources in fishery management planning discussions would improve background documents, information exchange, and understanding of recovery goals, they recognize current resources make this impossible.

But even if we had sufficient fiscal and personnel resources, there are still policy issues for the Congress to resolve.

Looking Ahead: Articulating National Policy

When the Heinz Center embarked on its fishery management project several years ago, one goal was to produce a book that would capture information and ideas relevant to the reauthorization of the Sustainable Fisheries Act in 2000. Dozens of interviews, decades of collective experience, numerous meetings, reviews, comments and reactions to discussions of fishery management were brought together in the book *Fishing Grounds*. I think I can speak for my co-authors Susan Hanna, Heather Blough, Dick Allen, Bonnie McCay and Gary Matlock in saying we appreciate the opportunity to share some of the ideas and voices of *Fishing Grounds* with you as you begin your deliberations on the Sustainable Fisheries Act. I would also like to thank the Heinz Center for making copies of the book available to Subcommittee Members.

Despite—or perhaps because of—the diversity of the contributors to the project, common themes emerged, cutting across issues, interest groups, regions and fisheries. How can we best learn from our experience and integrate complex management objectives? How can we create expectations for stewardship, maintain the diversity of fisheries, and still make the transition to sustainability?

As noted above, much of what has drawn the fire of litigation has occurred because we have not been successful at integrating management objectives. The Magnuson-Stevens Fishery Conservation and Management Act should be reviewed in conjunction with other important marine statutes to see if we can integrate the entire system in a way that improves coordination, reduces conflict, and moves toward ecosystem-based approaches to fishery management. That is not to say that fishery law can replace NEPA or the Marine Mammal Protection Act or the Endangered Species Act, but perhaps it is time to consider comprehensively what are our national goals and policies for the marine and coastal environment? How can integration across disciplines, regions, agencies, and jurisdictions be encouraged?

One of the pitfalls of environmental impact analysis, stakeholder participation, best available science and all the other terms, concepts and buzz words we use to talk about fishery management is that we often assume that information will set us free. “If we just get more data, better stock assessments, clearer understanding of ecosystem relationships, *then* we’ll get it right and nobody will challenge the outcome.” Although I would be the last to say we need not do a better job at information gathering and management, this view leaves out completely the importance and effect of differing societal values on fishery management decision making. Even if we had every last scintilla of information about Steller sea lions, pollock, Northern fur seals, climate change in the Bering Sea, and the complete set of food web relationships from tube worms to school lunch fish sticks, these facts would not resolve the differences in point of view that are at play in the North Pacific. That does not mean we cannot act, or that we cannot manage. It means that we must take into account values as well as numeric and objective information, and that our decision processes must make room for debate over goals and expectations as well as how many fish, where, by when, at what price and by whom.

The critical task for which neither the agency nor the councils have had sufficient time is an exploration and reconciliation of our expectations and goals for American fisheries. Management and allocation of scarce resources cannot be all things to all people. Short-term benefits or long-term ones? Managing for continued participation by all or for economic efficiency? Fishing as a privilege or a right? Realistically, how can they grapple with what managers and stakeholders think “success” would look like in 5 to 10 years, when everyone (and all the agency resources) is consumed with what the total allowable catch will be for the upcoming season?

One possible way to carve out time for that kind of consideration would be to grant Dr. Hogarth’s wish for a “time out.” Another might be to have a national conversation about it during the reauthorization. If we were to engage in that conversation at a level aimed at articulating a national policy, and creating consistent expect-

tations for stewardship, I offer these major policy choices and reauthorization issues identified by contributors to *Fishing Grounds*:

- Define “greatest overall benefit to the nation”
- Develop a strategy to reduce fishing capacity
- Resolve access to fishery resources
- Resolve the individual fishing quota moratorium
- Develop clear allocation criteria
- Clarify the respective roles of the regional fishery management councils, their advisors, the National Marine Fisheries Service, the Secretary of Commerce and Congress
- Diversify participation in the regional fishery management council system
- Consider user fees as a means of cost recovery or to provide returns to the public
- Define the role of industry in data collection and research
- Strengthen the biological scientific basis for fishery management
- Strengthen the social scientific basis for fishery management
- Develop an evaluation framework
- Strengthen education and training
- Bring fishery management incentives into line with long-term goals for fisheries

As we observed in *Fishing Grounds*: “These choices are not easy, particularly when much of what Americans value about fishing are its history and tradition—which will inevitably come in conflict with the future realities of fishing. Will we learn from this history, or cling so steadfastly to tradition that we are doomed to repeat it?”

Thank you for the opportunity to share these views. I will be pleased to answer any questions.

Senator KERRY. Ms. Dalton? Welcome back.

**STATEMENT OF PENNY DALTON, VICE PRESIDENT AND
TECHNICAL DIRECTOR, CONSORTIUM FOR
OCEANOGRAPHIC RESEARCH AND EDUCATION (CORE)**

Ms. DALTON. Good morning, Mr. Chairman and Members of the Committee. Thank you for inviting me to testify. I’m Penny Dalton, vice president of the Consortium for Oceanographic Research and Education. It’s an association of 66 of the country’s leading ocean science institutions. I also was of course, a former head of the National Marine Fisheries Service and a staffer on this Committee.

Earlier this year, all the former NMFS directors were invited by Bill Hogarth to spend a day and a half together comparing notes. We went to Galveston and discussed the agency over the past 30 years. What was really striking about the experience was not the differences among us, although there was a fair spread in age and also in background, but rather the similarities of the experiences that all of us had had. Controversy and political pressure, budget constraints, difficult regulatory decisions, and scientific uncertainty are not new to the National Marine Fisheries Service. And many of the remedies also remain the same: improved communications, transparency in the process, an investment in better science.

On the other hand, the former directors recognized that the problems the agency currently faces are particularly serious. In my statement this morning, I’d like to highlight five issues.

First is what everyone has talked about this morning, regulations and court cases. Both have risen pretty strikingly since 1996, but it's been for a variety of reasons. One of the things that hasn't come up is that the Regulatory Flexibility Act became judicially reviewable in 1996, so you began to see court cases brought under that. So there are a lot of things that people don't think about that really do impact litigation.

Probably the biggest problem, though, is that NMFS often doesn't succeed whenever a court case is brought and decisions are challenged. Before 1994, the government lost very few cases. In the past 4 years, more cases have been lost than won. This raises the expectations of potential litigants, and issues that you could resolve by the give and take in the regulatory process end up in the courts.

I agree with Suzanne that litigation has a positive side. It pointed out needed areas for investment, like collection and analysis of social and economic information. It also led to efforts by the agency to do a better job with laws like the National Environmental Policy Act. But losing lawsuits is really bad for morale, and litigation places greater demands on personnel to meet court requirements and deadlines.

The second issue is budget. This is one area where Congress has contributed to real progress since the Kammer Report. The biggest remaining hurdle may be to reach agreement on a budget structure that provides adequate flexibility to address things that you don't expect to come up at the agency but also ensure that all of the administration and congressional priorities are met.

The third one, that hasn't come up very much this morning, is work force trends. The NMFS staff is among the most dedicated and talented in the Federal Government, but they're getting older. A 2000 NRC report on recruiting fishery scientists pointed out that up to 50 percent of the NMFS's scientists could retire within 5 years. This graying of the work force is a potential serious near-term loss, but it also offers an opportunity to develop new skills and expertise in areas such as social science, stock assessments, and ecosystem management. It also provides a chance to seek greater work force diversity.

Fourth is the interaction of NMFS's missions and legal mandates within the laws it administers and with those of other state agencies and international organizations. In the fishery management process, roles are not well defined among NMFS, the fishery management councils, interstate fish commissions, and the states. Far too much time is spent wrestling for control because there are no clear boundaries. It's a little like throwing together several large jigsaw puzzles, with each of the laws being a puzzle. Each individually forms a coherent picture, but it's difficult to assemble a collective picture of the ecosystem from the combined pieces.

The fifth, and one that is near and dear to the CORE institutions, is improving NMFS science. Not surprisingly, our institutions recommend that NMFS pursue a strong program of extramural basic research. In 2000, CORE held a workshop on the role of scientific information in fisheries management. The panel recommended support for collaborative research efforts. They also felt that while NMFS's research methods are sound, peer review is limited, and this can undermine its credibility. Nonetheless, long-term

NMFS records have been invaluable for studying changes that occur at the ecosystem level, and the records should be made widely available to academic researchers and others. This, again, highlights the need to look at ecosystem management. It's a little bit like the weather. Everyone talks about it.

With support from NMFS and private foundations, CORE currently manages a research program called the Census of Marine Life. The goal of the Census is to expand our understanding of quantity and distribution of life in our world's oceans so that changes can be monitored and understood. It's unique among global marine research programs in focusing on diversity.

An ecosystem approach to both science and management could provide a rational mechanism to move NMFS out of its current reactive management approach. The big question is how to get there. What is needed is an opportunity for the agency to work with its constituent groups and without the help of folks like OMB to define long-term priorities and a strategy to improve our understanding and sustainable use of living marine resources.

The toughest criticism of NMFS usually comes from its most consistent supporters—fishermen, anglers, environmentalists, and the Congress—who genuinely want the agency to succeed. Once priorities are established, it will be necessary to evaluate current laws and practices and make necessary changes. The strategy must address still unresolved issues like overcapacity and access, user fees, agency and organizational roles in the transition to ecosystem management. Although intellectually challenging to develop, and politically difficult to implement, it would offer real promise for breaking out of crisis management. As part of the evaluation, consideration should be given to the development of new legislation that would incorporate existing single-focused laws into an ecosystem-based management approach.

Today a new commission on ocean policy is considering the elements of a comprehensive national policy. That commission should be audience for the outcome of the NMFS priority-setting process. The difficulty of such an effort may seem overwhelming when one considers the breadth and complexity of the issues facing NMFS. Nevertheless, with the support from this Committee, I am confident that it is a goal that can be reached. Thank you.

One last comment. I think one thing that you really do need to do is separate out short-term and long-term goals. Most of the things you've been talking about this morning are short-term needs. And the kinds of things that Ray Krammer and Bill Hogarth have been working on are really going to help address them. But I also think that we haven't paid enough attention to the long-term aspects of the problem.

Thank you.

Senator KERRY. I think we would concur with that. I wanted to actually ask a question about the long-term.

[The prepared statement of Ms. Dalton follows:]

PREPARED STATEMENT OF PENNY DALTON, VICE PRESIDENT AND TECHNICAL DIRECTOR, CONSORTIUM FOR OCEANOGRAPHIC RESEARCH AND EDUCATION (CORE)

Good morning, Mr. Chairman, and Members of the Committee. Thank you for the opportunity to be here today. I am Penny Dalton, Vice President and Technical Di-

rector of the Consortium for Oceanographic Research and Education (CORE), an organization that represents 66 of the nation's leading academic institutions in the ocean sciences. While my testimony includes CORE views on fishery-related research and education issues, its primary focus will be on my experience as former director of the National Marine Fisheries Service (NMFS).

My tenure with NMFS was relatively brief—just 21 months—but what it lacked in length was more than made up by the intensity of the experience. When I came to NMFS, my goal was to initiate some needed changes. For years, NMFS has been an agency of concern for fishermen, environmentalists, state officials, and the Congress. Through incremental changes in the responsiveness and transparency of the agency decision-making process, I hoped to begin to address those concerns.

Unfortunately, my existence was taken over by regulatory processes, litigation, negotiations, Secretarial briefings, Congressional testimony, public meetings, budget problems, and reporting deadlines. I found that the pace and immediate requirements of day-to-day operations drove the organization, subsuming efforts to develop or pursue long-term goals. Life at NMFS was a little like being on the F/V *Andrea Gail* in the *Perfect Storm*; you constantly felt that the next wave might well be the one that would capsize the boat.

There also were enormously positive aspects. For the most part, the NMFS staff must number among the most dedicated in the Federal Government, working long hours to meet impossible deadlines in the face of almost constant controversy. While the agency frequently was the subject of criticism, the comments usually were well-intentioned and came from stakeholders—fishermen, anglers, environmentalists, and the Congress—who genuinely wanted NMFS to succeed. Over the years, this support has been essential for maintaining the integrity and morale of the agency and I want to take this opportunity to thank those of you here who have been part of that effort.

NMFS Management and Budget Challenges

How did we get to where we were in March 2000? To answer that question, Deputy Under Secretary Scott Gudes and I commissioned an independent review of the NMFS budget and management processes. We were delighted when Ray Kammer, head of the National Institute of Standards and Technology and the former NOAA Deputy Under Secretary, agreed to head the review team. He delivered his initial report in June 2000. In addition, other groups, including the H. John Heinz III Center for Science, Economics and the Environment (Heinz Center) and the National Research Council (NRC) examined different aspects of the agency's mission and operations. Collectively, these reports point out a number of challenges that must be addressed by NMFS if it is to move beyond its current problems.

Regulations and litigation. In 2000, NMFS regulatory activities ranked fourth among federal agencies based on the number of publications in the *Federal Register*. The top three were the Environmental Protection Agency, the Federal Aviation Administration and the Federal Communications Commission. While the Federal Communications Commission budget is relatively modest, the other two agencies have budgets and personnel numbers that far exceed those of NMFS.

Accompanying this intense regulatory activity has been a surge in litigation. Beginning in 1996, legal challenges have risen from an average of 1 or 2 each year to a current high of 26 in 2001. While much of the rise has been blamed on enactment of the Sustainable Fisheries Act, a larger proportion of the new cases have been challenges under the National Environmental Policy Act, the Endangered Species Act and the Regulatory Flexibility Act. For example, a major contributor to the agency's caseload came about when the Regulatory Flexibility Act became subject to judicial review in 1996.

More troubling than the cases themselves has been the decline in the ability of NMFS to prevail when agency decisions are challenged. Before 1994, the government lost very few cases. In recent years, however, this record has been reversed and in the last four years the agency has lost more cases than it has won. This gives rise to expectations of success by other potential litigants, and issues that might have been resolved by the give and take of the regulatory process are remanded for consideration by the courts.

The rise in legal activity has had both positive and negative effects on NMFS. On one hand, it has served to point out programmatic areas where additional resources are necessary, such as the need to improve the collection and analysis of social and economic information relating to the marine activities NMFS regulates. Litigation also has led to greater awareness of and investment in strengthening agency compliance with procedural statutes such as the National Environmental Policy Act. On the other hand, the litigation itself creates demands on personnel to meet court requirements and deadlines. This may cause the agency to fall further behind in the

regulatory process in other areas, since the people responding to the court requests are also integral to the regulatory process. In addition to the increased workload, a negative court decision often has a serious adverse impact on morale and contributes to staff "burnout" that can negatively affect agency capabilities to respond in subsequent cases.

Budget constraints. While NMFS has received substantial funding increases over the past decade, severe fiscal constraints persist in some regions. The Kammer report highlighted a number of contributing problems in the NMFS budget structure, including: (1) failure to fund full costs for non-discretionary increases like pay raises; (2) dedication of budget increases to new initiatives and stagnant funding for base program activities; (3) lack of base budget analyses; and (4) delays in allocation of appropriations and limited flexibility due to proliferation of budget accounts. In the time period since the Kammer report was completed, Congress and the Administration have worked together to address overall budget shortfalls, substantially increasing the funding available to the agency. In addition, Dr. Hogarth is continuing efforts to develop procedures for base budget analysis and to improve the allocation process. The biggest remaining short-term challenge in this area may be to reach agreement on a budget structure or process that provides the agency with adequate flexibility to meet unanticipated needs but still ensure that Administration and Congressional priorities are met.

Interacting missions and legal mandates. NMFS is the federal agency with primary responsibility for stewardship of this nation's living marine resources. However, that mission and legislative authority interact with those of other federal and state agencies and international organizations, and the boundaries among these entities are often far from clear. The Department of the Interior, the Environmental Protection Agency, the Army Corps of Engineers, and international fishery commissions all have statutory mandates for programs that directly affect living marine resources. Even within NOAA, the National Ocean Service has responsibility for coastal zone management and marine sanctuaries and the National Sea Grant College Program carries out important research, outreach and education activities. Nor are the relative roles well-defined in the fishery management process among NMFS, the regional fishery management councils, the interstate marine fisheries commissions and the states. As a result, far too much time is spent in debating who is in charge and in competing for fiscal resources.

Another obstacle to effective marine resource management is that, while a number of entities may be affected by or have defined roles in the decision-making process, legal accountability is construed narrowly. The result is that participants such as the regional fishery management councils are important in formulating fishery regulations but are not formal participants in a legal challenge, even if they are willing to be. Similarly, the councils have no legislatively defined role in development of a biological opinion under the Endangered Species Act for fisheries that affect a listed species. This situation contributed substantially to initial problems in the biological opinion for the North Pacific groundfish fishery. It was effectively addressed through administrative action to include the North Pacific Council as a full partner in the process. A related issue is the application of our marine resource statutes to U.S. participants in international fisheries, particularly where there is a U.S. mandate to take conservation action, but little international consensus on the need. Consequently, our fishermen may be restricted in their activities while foreign fishermen operating in the same international waters continue to fish with the potential to undermine U.S. conservation efforts.

These and similar examples illustrate the need for flexibility and cooperation in the dealing with interacting missions and laws. In the areas where NMFS has been able to work through an interjurisdictional process, the agency has achieved some notable successes, like the recovery of Atlantic striped bass populations and steady increases in the number of endangered Kemp's Ridley sea turtle nests.

Workforce trends. Over the next decade, one serious concern for NMFS will be the "graying" of its workforce. In July 2000, the Ocean Studies Board of the NRC conducted a workshop on recruiting fishery scientists. The report of that workshop states that, "Similar to other federal agencies, NMFS anticipates regular retirement of 30 percent of its scientists within the next 5 years; an additional increment of as much as 20 percent will leave because of early retirement incentives." That translates into a potential loss of up to half of the agency's scientific workforce within a relatively short period of time.

In addition to replacing retired scientists, NMFS also must respond to changes in the skills and expertise needed by existing and potential personnel. The agency already is working with Sea Grant to increase the number of economists, social scientists, and stock assessment experts on staff. Transition to ecosystem-based management will require development of indicators of ecosystem conditions and more at-

tention to ocean observing systems that monitor changes in those indicators. Training in public outreach, adaptive management and ecosystem function also are likely to be priorities. Finally the agency must continue to seek greater diversity in its workforce.

Scientific basis for marine resource management. CORE institutions stand ready to assist NMFS in both education and research efforts. The CORE institutions represent the best marine research capability in the world. Almost all are engaged in scientific investigations relevant to fishery resource management to varying degrees and many work with NMFS to provide information and analyses for management.

Much of the research and monitoring work of NMFS is focused on stock assessments that answer the narrow question of "how many fish are there?" These stock assessments have historically been the centerpiece of the NMFS scientific effort and are essential for making management decisions on individual species. In times of limited budgets, NMFS has devoted the majority of its research resources to this very important, but necessarily limited endeavor.

While this research is methodologically sound, it generally receives very limited peer review in the conventional sense. Typically the need for the data is immediate and management decisions benefit from its rapid availability. The data may be examined by regional scientific and statistical committees or receive an internal review, a practice which does not meet traditional academic standards. Such limited review can undermine the credibility of the NMFS scientific effort. Nonetheless, these long-term records have been invaluable for the re-analysis of changes that occurred at the ecosystem level. Making this information more widely available to academic researchers and others could add an important dimension to the overall scientific effort.

There is no question but that accurate, timely and comprehensive stock assessments are essential for making good management decisions. Narrowing the margin of error is in the best interest of all stakeholders and controversial decisions based on sound science are more likely to be met with agreement than those arrived at by other means. In 1998, the NRC noted that "the quality of data used in five stock assessment models was more important than the particular model used." One major contribution to improving resource information will be the construction of a new series of modern fishery survey vessels, the second of which is proposed in the Fiscal Year 2003 budget currently pending before the Congress. CORE institutions recognize and support the strong leadership provided by the Commerce Committee and its members on this issue, as well as on the need for renewal of the academic research fleet.

In addition to the new fishery vessels, CORE believes that NMFS's scientific credibility could be enhanced if it supported a robust program of external independent research that would serve as a validation of the rapid, task-oriented, narrowly focused surveys conducted by the agency today. In 2000, CORE held a workshop examining the role of scientific information in fisheries management. In addition to recommending that scientific information pass independent scientific review, the panel recommended that collaborative data collection and research efforts be encouraged among agency scientists, independent scientists and representatives of industry and public interest groups. Increased investment in such partnerships should increase the reliability and quality of the NMFS scientific effort.

In addition and as mentioned earlier, NMFS typically has focused its scientific effort on science that is very close to the decision at hand; be it counting fish or understanding the life cycle of salmon, the avenue of investigation has been relatively narrow. We now realize the limitations of such an approach and today NMFS is beginning to consider managing fisheries as comprehensive ecosystems. In their 2000 report on marine fisheries data, the NRC recommended that NMFS needed to "[improve its] understanding of the functioning of the marine ecosystems affected by fishing activities by studying important non-target species to determine their feeding habits, their distribution, and their prey and predators." This inclusive approach to fisheries management is one that CORE supports.

With the backing of NMFS and non-governmental foundations and under the guidance of a group of ten senior marine scientists from around the world, CORE currently manages a comprehensive research program called the Census of Marine Life. The goal of the Census is to expand our understanding of the quantity and distribution of life in our world's oceans so that changes can be monitored and understood. Its unique niche among global marine research programs comes from its focus on diversity through the higher levels of food webs, the discovery and classification of newly discovered species, and its examination of timelines extending back beyond the limits of modern ocean science.

The benefits of this line of study in such areas as climate change and commercial fishery management have become clear. Ecosystem management requires the development of new technologies as well as knowledge and understanding of poorly studied non-commercial and rare species that are the focus of the Census. Earlier this week, the Washington Post ran a major story on how jellyfish "blooms" affect other marine life. One reason that single-species management of fisheries around the world has failed to provide sustainability is that competition from poorly studied species, such as jellyfish, can displace more valuable fish species. Part of the Census is a rapidly growing ocean biogeographic information system to house comprehensive biological records and to make them available online. The transition to ecosystem management will require imaginative and broadly based analysis of the best available records, including those from NMFS.

Without broader knowledge developed from a robust research and cataloging effort, such as that being undertaken by the Census, ecosystem management of fisheries will be difficult, if not impossible. Thus, it is important for NMFS to invest in a strong program of independent basic research to support the task of implementing a comprehensive ecosystem management strategy.

Conclusion

The Heinz Center book, *Fishing Grounds*, stresses the importance to NMFS of evaluating the impacts and effectiveness of its management decisions. It states that, "Management decisions tend to be reactive, rather than strategic actions based on long-term goals and objectives. For this reason, the resolution of one problem often leads to the generation of another, and decisionmakers continue to jump from one crisis to the next."

As Bill Hogarth and Ray Kammer have indicated in their testimony, NMFS has taken steps and will soon receive a number of recommendations for addressing the challenges outlined above. However, many of these steps are short-term solutions that are not likely to move the agency out of its current reactive management approach.

What is needed is an opportunity for the agency to work with its constituent groups to define long-term priorities and a strategy for a coordinated program to improve our understanding and sustainable use of living marine resources and to make the transition to ecosystem management. Once those priorities are established, it will be necessary to evaluate our current laws and practices and make necessary changes. The program must address such still unresolved issues as overcapacity and access in fisheries, user fees, agency and organizational roles, and the transition to ecosystem management. It would be intellectually challenging to develop and politically difficult to implement, but offers real promise for breaking out of the cycle of crisis management. As part of the evaluation, consideration should be given to the development of new legislation that would incorporate existing single focus laws into a single, ecosystem-based marine resource management statute.

Today, a new Commission on Ocean Policy has been established and is considering the elements of a comprehensive national policy that will guide marine resource decisions in the decades to come. The foundations of our current marine resource policies can be traced back to 1969 and the recommendations of the first ocean commission named for its chairman, Julius Stratton. The Watkins Commission should be the audience for the outcome of the priority-setting process outlined above. The difficulty of such an effort may seem overwhelming when one considers the breadth and complexity of the issues facing NMFS and the Commission. Nevertheless, with support from this Committee, I am confident that it is a goal that can be reached. Thank you.

Senator KERRY. Thank you very much, all of you, for your testimonies. They're helpful, and we'll try to use these next minutes as valuably as possible.

I'll just limit myself to 5 minutes, and then we'll take each of our colleagues and see where we wind up.

Mr. Kammer, just quickly, if we can, I understand you're working with the National Association of Public Administration and NRC on a report now?

Mr. KAMMER. Yes, we are.

Senator KERRY. What's the current status of that report?

Mr. KAMMER. The NRC has actually completed their deliberations. And they focused on the science and the——

Senator KERRY. When could Congress expect the report?

Mr. KAMMER. I think we're about 2 weeks away from the complete report.

Senator KERRY. And what are the issues that are going to be covered in this report?

Mr. KAMMER. Progress in solving some of the management issues that were raised in—

Senator KERRY. Does it complement the previous study?

Mr. KAMMER. Yes, it does.

Senator KERRY. It does.

Mr. KAMMER. It follows on from that and expands into some other areas.

Senator KERRY. Are the findings consistent with the previous study?

Mr. KAMMER. There have been some improvements. The—one of the things that was quite extraordinary is Congress provided \$19 million in increases for enforcement. Up until 9/11, the Marine Fisheries Service relied on the Coast Guard, who obviously had other assignments, to assist in enforcement. And because that \$19 million was there, they were able to establish collaborative programs with the states so that they continued enforcement.

Senator KERRY. Let me just ask you quickly, on the financial picture, in your preliminary report, you talk about the funding proposals, additional base resources needed, and you came up with a total increment of \$186 million. Over what period of time was that? For 1 year?

Mr. KAMMER. That would ultimately be an annualized basis. For most of the area—

Senator KERRY. That figure is much larger than what Bill Hogarth said. Dr. Hogarth said \$500 million over 5 years, \$100 million a year. You're talking \$186 million in the first year and each year after.

Mr. KAMMER. Well, Congress provided, in 2001, about \$109 million—

Senator KERRY. Yes, that was just for 1 year, though.

Mr. KAMMER. It appears from the—

Senator KERRY. Well, on an annualized basis, I understand. But that still leaves you \$86 million shy.

Mr. KAMMER. Yes.

Senator KERRY. So you need that additional.

Mr. KAMMER. Yes. Plus, we did not address adequacy of ships for data gathering, because—

Senator KERRY. So you're not that far off where he was.

Mr. KAMMER. No. No, when he said the number, I thought, "Well, that's about right."

Senator KERRY. Now, in June of 2000, which is your report—

Mr. KAMMER. Right.

Senator KERRY.—you had a series of—you had an agency progress report on requirements. You talked about the FMPs with EISs, frequent stock assessments conducted, the marine mammal stocks, the ESA, the Endangered Species Act listings, and you had a graph showing them at their current levels. In the 2-years since that, I think that has not changed almost at all, has it?

Mr. KAMMER. The only change that I've really been able to detect is there were only 41 fishery management plans when I did the review. There's now 42. And, of course, the one that's been added is—

Senator KERRY. So that's a 2-year period. It's just been stale-mated.

Mr. KAMMER. Most of the people that are capable of doing this work are also the people that are necessary for assisting in litigation.

Senator KERRY. Okay. Litigation happens because you don't have consensus. You have aggrieved parties, or people who sense they are aggrieved. Dr. Benton didn't come in here and talk about a lot of litigation in Alaska. What does that say about—does it say anything about the way in which the management council is working? Does it say something about the competing interests that aren't adequately addressed, i.e., limited entry and/or buyout and/or—I mean, aren't the economics simply not being addressed?

Mr. KAMMER. That's my personal view, yes, definitely. I think that the way out for the non-Alaskan fisheries is probably some combination of buybacks to reduce capacity, limited entry—don't buy back without limiting entry—economic assistance, and economic development. And it's a huge problem, and it merits a lot more attention than it's gotten so far.

Senator KERRY. Let me just move quickly, because I want to limit my time so my colleagues get their opportunity there.

Anybody—particularly Ms. Dalton, I'd like you to address this, and Ms. Iudicello—but you're talking about the time out. Here we have a monk fish situation where we can't get—for some reason, the agency deems itself incapable of making a change to allow people to go into a fishery where there's increased fish. I mean, that just drives people nuts. Are we really that incapable of responding? What's the problem here?

Ms. DALTON. There was one example I can think of on sea turtles. We had emergency regulations to shut down shrimping whenever leatherback turtles went through an area. When the initial regulations came out, we talked to the shrimpers. They said, "That's fine, as long as you open it back up again." The way that the regulations were written, there was no way to open it back up.

Senator KERRY. So do we have to change the way it's written, or could the Secretary not exercise discretion?

Ms. DALTON. We have to become more careful upfront. If you don't assume that the fishery is going to get better when you write the regs, they are geared more toward ratcheting down than toward the recovery. So part of the solution is to build more flexibility into the rulemaking process so that you can go back and adjust things.

Senator KERRY. Do you think Ms. Iudicello, that would be beneficial? We don't want to stop doing that. We don't want to leave fishermen for 2 years and stop everything and not change that.

Ms. IUDICELLO. No. I think Penny's right. The flexibility is the issue. And the tighter we have ratcheted down the objectives and the numbers and the time, the less flexibility the agency has. On the other hand, you know, you don't want it to slide back to the

pre-1996 situation where there was so much flexibility that you couldn't tell if somebody wasn't acting when they needed to.

Senator KERRY. Well, in 1996, I specifically remember writing the discretion in. Ms. Dalton, I think you were here when we did that. We gave the secretary the power to make these decisions where they weren't being made. Certainly we're not going to undo that authority. So the Secretary now ultimately should have this kind of discretion so he can break deadlocks, move forward, have flexibility at a level where it's really based on the science, the goals and objectives of the act itself. The responsibility has to fall somewhere, ultimately. It's the lack of that responsibility for a long period of time that's put us in this predicament.

Ms. IUDICELLO. I think that's right, and I think Mr. Gutting has mentioned it, Dr. Hogarth mentioned it. One of the big issues that has caused problems, especially in the procedural aspects of ESA, NEPA, and Magnuson, and their interface, is this notion of roles and responsibilities. Who is in charge? Who is the decisionmaker? When is it really a decision? Is it when the council votes, or is it when they make a recommendation? I know the agency is grappling with this, and they are trying to produce some clarity. At the moment, I'm working with the Gulf council as one of the contractors helping them produce an EIS, and there still isn't agreement among the various offices and lawyers about these issues. So I think consistency and clarity of where the responsibilities and decisions are for these various actions are very important.

Senator KERRY. Well, we need to do that. I'm going to leave the record open for my own questions to be submitted in writing, and any other Senator, for the period that I stated earlier. I hope each of you will help us build this record adequately and responsibly.

Senator Snowe.

Senator SNOWE. Thank you all very much. Mr. Kammer, first of all, let me just ask you this. Your report was conducted and completed in June of 2000, and there's been 2 years since then.

Mr. KAMMER. That's right.

Senator SNOWE. Are there any updates to these recommendations? Is that what this other additional report will provide? Second of all, which of these recommendations, beyond the funding issues, have not been implemented, and why?

Mr. KAMMER. Yes, the NAPA report will update, and—

Senator SNOWE. How will it update the original study?

Senator KERRY. Could I just interrupt for a minute? I need to go to a meeting right now. I'm going, Senator Snowe will question, and then Senator Breaux will end the hearing on the last question.

I just want to thank everybody for taking the time. This is obviously urgent. We're going to treat it thusly, and we hope everybody will help us to do what is thoughtful, sensible, and respond adequately, and we thank you for being here.

Thank you, Senator Snowe.

Senator SNOWE. Thank you.

Mr. KAMMER. In the intervening period, I think a lot of progress has been made on law enforcement, on observer and cooperative statistics activities, and some of the protected species programs. Unmet things still: the NEPA programs, socioeconomic analysis is

an unmet need, and it's very important, and I think the most daunting one is actually stock assessment improvements.

Senator SNOWE. Right. I noticed that. I thought it was the most notable in your funding request, that, of all the funding requests, it represented the greatest increase of \$100 million. You have said that we should be taking immediate steps to improve the situation by providing a comprehensive assessment. I sense urgency with respect to that recommendation. So that requires some action on the part of Congress and obviously the agency, as well.

Mr. KAMMER. Yes. The steps in stock assessment are, you have to go out on a ship and gather data. You have to bring it back to highly specialized individuals, of which there are about 200 educated in the United States today, all, of the entire population, there's only about 200. And then they have to put them into models and make a prediction, because the regulation is all about predicting what next year is going to be like, not so much what this year is. And that's very hard. The state-of-the-art needs to be advanced. I totally agree with Ms. Dalton, that more investment needs to be made in research. The models need to get better.

This is a hard area, and it's almost intractable. It's not going to get better quick. Right now, doing a stock assessment every 3 years is just crazy. It's not fair. It's not fair to anybody in the system to be basing all of your decisions on data every 3 years instead of every year.

Senator SNOWE. Do you think that your recommendations, if fully implemented, would be able to ease the crisis in fisheries management that we have today, especially with this litigation-based management? How far would it go toward accomplishing that? What recommendations can you make to this Committee to help us in improving fisheries management over both the short term as well as in the long term?

Mr. KAMMER. I think that there are key steps: program and budget reviews, set priorities within the agencies—this is something NMFS does to itself; this isn't something other people have to do to it—establishing a regulatory calendar and putting it on the Internet. It drives the constituents crazy that they don't know what the status of a regulation is, and then they have to spend money, and then they may be wasting their money. It's not a reasonable situation. Simplify regulations, make them uniform, get rid of these 13 levels of review that Bill alluded to. Nobody's responsible when there's 13 people reviewing a decision. That's crazy.

Senator SNOWE. That's exactly right.

Mr. KAMMER. Analyze the litigation, figure out where we're going wrong so we can fix that and keep doing it. And then external review: I'm a firm believer in any laboratory program having regular external review so that you can make sure you stay near the state-of-the-art and you stay competent.

Senator SNOWE. Ms. Iudicello, you mentioned the fact that the system is working. Obviously, there is disagreement in that regard, in terms of it working. I certainly wouldn't suggest that it's working in the New England groundfish industry. Litigation has really overtaken the decisions that directly affect the fisheries and it's to the exclusion of almost every other decision. That is the problem. Litigation should be the last resort, not the first resort. As Mr.

Benton said earlier, it has perverse consequences as well, because it forestalls further progress that can be made in environmental mitigation, in protecting the habitat and so on, because it brings everything to a halt.

Do you think that there are some areas which really need redress here with respect to the process and the inconsistencies, as well as the conflicts between the two approaches, between NEPA and the Magnuson-Stevens Act?

Ms. IUDICELLO. Well, first, I would like to say that I don't think any of the litigation—I haven't analyzed all of the cases, but in the cases that I have looked at closely, I would agree with Mr. Benton that the Essential Fish Habitat litigation did have a perverse result in a couple of regions. But I think that if you look at, for example, the lawsuit in the North Pacific over Stellers sea lions, there really was a lack of compliance with the laws. NEPA is not a new requirement. NEPA was on the books before the Magnuson Act, so the necessity to comply with that kind of environmental impact analysis predated the fishery management planning process. The litigation was over an EIS that was out of date.

I think that if you do what Mr. Kammer is suggesting and you analyze the lawsuits and you see where you lost and what went wrong, some of them are over substance. They are over not meeting the Magnuson Act. Some of them are over procedure, over not comporting with regulatory flexibility. And they are not all, by the way, from environmental groups. Environmentalists, anglers, and commercial fishermen are responsible for this litigation. It's not just one stakeholder group.

So I think it would be glib to say—for me to say that all the litigation has been good, or for anyone else to say that it's all been bad. I think certainly the consequences of litigation are bad, not only for the agency, because it absorbs all of their time and energy and people. But it's also bad for stakeholders, because if you are not a litigious group or person or company, the minute the papers are filed in court, you either have to be on the lawsuit or you're standing on the sidelines. Maybe you have a great idea to negotiate something out. Maybe you have a good idea to do something better, but we can't talk—people in that situation can't talk to the agency. They are excluded from the process once a lawsuit is filed. So, yes, you're either in court or on the sidelines.

Senator SNOWE. Okay. Thank you. I wish we had additional time, but I can see that we're progressing toward the vote. Thank you all very much, and we appreciate your thoughts.

Senator BREAUX. I just had a question. Ms. Iudicello, I was underlining and reading a book. It's a good historical perspective of everything that we've done. I remember back in the mid 1970's—maybe someone in the audience is old enough to remember, as well—that the whole focus of the American Fisheries Act, Magnuson Act now, was to get rid of the foreign fishermen. In fact, I had coined the phrase in the legislation that the purpose of the act was the “phase-out of foreign fishermen.” Poof, they're gone. P-o-o-f, phase-out of foreign fisherman. We accomplished that. But, then the question becomes the allocation of those resources to the American fishing industry, and that's the real challenge today.

Mr. Gutting, you point out that in your opinion, that the agency has drifted toward protectionism as opposed to, what you would consider to be proper management. My question is, isn't it—you've got to protect the resource so that you can manage so that you can allocate it. If you don't protect it, you're not going to have anything left to allocate to commercial and recreational, and put enough fish on the table for an American consumer, who more and more eats more and more fish, which is good, I think. So can you comment on what you mean that they are moving toward protectionism?

Mr. GUTTING. Thank you, Senator. Yes. I think their focus has been on looking at the fish in the water, and that's very important, being sure there are fish going to be in the water. But, as you point out, we've got to bring those fish ashore for people to benefit from them, whether you're a recreational fisherman, whether you're a commercial fisherman, whether you just like to go out and look at what's out there, nonconsumptive use.

The users count, and they need to be thought about. Things like buyback programs that the Committee expressed an interest in is what I'm talking about. We need to focus on the needs of people and how to address those needs to make the system work for them so we can have the recreation and we can have the food. And that's where the agency has not been looking, not been creative, not been coming forward with solutions. It's left it up to the Congress. It's left it up to you to try to fashion some kind of mechanisms. There's no leadership. There's no getting-ahead-of-the-problem kind of thinking in the agency.

Senator BREAU. Well, one of the concerns—I think that we created this dual management area—and, you know, I always point out that when everyone is in control or everyone is in charge, no one is in charge.

Mr. GUTTING. Right.

Senator BREAU. So we've got the councils—8 councils out there making major decisions with a sort of oversight process in Washington. We've got Washington, on the one hand, looking at it, and we've got the various states with the political process of who is on those councils making decisions. So it's a natural conflict here, and I'm not sure whether we were right back in the 1970's the way we established it or not.

Mr. GUTTING. I think we need to clean up the process and make it more efficient. I think we need to be sure that the managers have the tools they need to get the job done. And then I think we need to hold them accountable.

Senator BREAU. Penny, you had a comment?

Ms. DALTON. Yes. An other problem that you've got along the same lines is there's no defined role for the councils in laws like the Endangered Species Act. A big part of the problem we had with Stellar sea lions initially, was how to deal with the council and get them involved in the process, as well. So that kind of thing creates a real issue, as well.

Senator BREAU. Well, let me thank all of you. We could continue this for a long time. But unfortunately, we don't have a long time to continue it. Therefore, I'll thank all of you. We'll stay in touch.

And, with that, the Committee will stand adjourned until further call of the chair.

[Whereupon, at 11:45 a.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. JOHN E. SUNUNU,
U.S. REPRESENTATIVE FROM NEW HAMPSHIRE

Mr Chairman, thank you for allowing me this opportunity to present testimony before the Subcommittee, and in particular, for allowing me to discuss a matter that I believe is of utmost concern to the men and women who fish the Gulf of Maine waters of New Hampshire, Maine and Massachusetts.

Mr. Chairman, the federal groundfish decision handed down two weeks ago by the U.S. District Court in the matter of *Conservation Law Foundation v. Donald Evans*, will be, I fear, catastrophic to the in-shore fishing industry in the state of New Hampshire and to small boat owners across the Northeast. The net effect of this ruling will force hundreds of small business owners out of business.

Under this decision, District Court Judge Gladys Kessler declared that the National Marine Fisheries Service (NMFS) had not done enough to stop overfishing in the Gulf of Maine. As a result of her decision, new rules were set forth that close off more sections of fishing areas and drop the maximum days at sea a fishing vessel may operate each year from 88 to 70. In addition, net sizes were required to be changed to allow smaller fish to avoid being caught accidentally. The decision also set the effective date for these changes as May 1st—just 5 days after the decision was handed down.

We need to strengthen our fish stocks in the Gulf of Maine to maintain the long-term viability of the Northeast fishing industry; something every fisherman knows. However the rigid decision of the Court and the suddenness of its implementation provides no flexibility to those who fish the Gulf of Maine waters, and will push many small boat owners into bankruptcy.

Mr. Chairman, over the past few months, I have been working to help lessen the blow New Hampshire's fishing fleet might feel as a result of any new restrictions on fishing by the court. However, I was surprised that the District Court's ruling went beyond the negotiated settlement reached between fishing and conservation groups, and I am urging action to hopefully remedy the ill-effects of this decision. Just yesterday, I wrote to the President and to U.S. Commerce Secretary Donald Evans and asked that portions of the decision be reconsidered, or the decision be appealed in its entirety by the Administration. I ask unanimous consent that a copy of my letter be made a part of the Record.

Mr. Chairman, we need to look at all our options if we are to preserve not only New England's fishing industry but also a sea-going heritage that is as old as our nation itself. I would like to commend you and Senator Snowe, the Subcommittee's ranking member, for your diligence and your hard work on behalf of the Northeast's fishing industry over the years and for your continued concern for the well-being of this crucial component of New England's economy.

Once again, thank you Mr. Chairman for this opportunity to present testimony on such an important issue. I look forward to working with you, Senator Snowe and our Congressional colleagues from the New England region in our effort to find a remedy to this decision.

UNITED STATES HOUSE OF REPRESENTATIVES
May 8, 2002

The PRESIDENT,
The White House,
Washington DC.

Dear Mr. President:

U.S. District Judge Gladys Kessler has dealt a devastating blow to New Hampshire's groundfish fishing industry with her April 26 ruling regarding fishing restrictions in the Gulf of Maine (GOM). I believe her order is arbitrary and capricious,

and encourage the Administration to evaluate opportunities to file for reconsideration or appeal of this case.

In handing down her decision, Judge Kessler exceeded the restrictions negotiated in a settlement agreement that resulted from mediation between conservation and fishing groups. The Judge deepened the reduction in fishing days, or Days at Sea (DAS), that would be allowed and closed down additional fishing areas. It is unclear to me why she felt compelled to go beyond the agreement reached in mediation.

Moreover, the order's May 1 effective date is unreasonable. Since it will be some time before the groundfish fleet can procure the necessary materials to conform to the increased net mesh size mandated in Judge Kessler's order, immediate compliance with gear requirements is impossible. An appropriate period of adjustment is required.

According to the information I have received from the fishing community, the Judge's decision reflects outdated biological data and does not build constructively on the significant progress that has been made toward replenishing GOM groundfish stocks. Our fishing community supports efforts to rebuild groundfish stocks, and it is my understanding that the National Marine Fisheries Service has evidence that the stocks are rebounding at a faster rate than the agency expected.

Judge Kessler's ruling as it presently stands creates an economic disaster for New Hampshire's in-shore fishery. I do not believe that it is appropriate to so callously discard an important part of our culture and heritage, to say nothing of the livelihood and future of our fishermen and their families.

Sincerely,

JOHN E. SUNUNU,
Member of Congress.

cc: Commerce Secretary Donald L. Evans

U.S. SMALL BUSINESS ADMINISTRATION
May 17, 2002

Hon. JOHN F. KERRY,
Chairman,
Subcommittee on Oceans, Atmosphere and Fisheries,
Commerce, Science, and Transportation Committee,
Washington, DC.

RE: STATEMENT FOR THE RECORD

Dear Chairman Kerry:

On May 9, 2002, the Senate Subcommittee on Oceans, Atmosphere and Fisheries held an oversight hearing on the National Marine Fisheries Service (NMFS) Management Issues. The hearing focused on the current state of fishery and protected resource management in the United States. The steps that need to be taken to rescue it from its current state of crisis were also discussed at the hearing.

As Chief Counsel of Advocacy, I am charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act (RFA)¹, as amended by the Small Business Regulatory Enforcement Act of 1996 (SBREFA).² I appreciate the opportunity to comment for the record on your hearing. Please note that, as an independent office, these views reflect the Office of Advocacy's position and do not necessarily reflect the views of the Administration or the U.S. Small Business Administration.

The viability of the fishing industry and the activities of NMFS are a great concern to Advocacy. As Dr. William Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA), stated in his testimony, regulations issued by NOAA Fisheries affect not just marine resources but also people, businesses, and communities associated with the resources. Advocacy's statistics indicate that 99 percent of commercial fishing businesses are small.³ Many of these small businesses operate out of small communities. Those small businesses and communities are directly impacted by NMFS activities.

In the past, Advocacy has met with members of the fishing industry to discuss their concerns. One of the issues raised by the fishing industry during those discussions is NMFS's failure to use the best available science in formulating regulations.

¹ 5 U.S.C. §601 et seq.

² Public Law 104-121, 110 Stat. 857 (codified at 5 U.S.C. §601 et seq.)

³ *Employer Firms and Employment by Employment Size by North American Industry Classification System Code*. United States Census Bureau, Department of Commerce, prepared under contract by the Office of Advocacy, Small Business Administration, Washington, DC, 1999.

Dr. Hogarth articulated this same concern at the hearing. Specifically, he testified that “the agency’s science is sometimes hampered by the lack of adequate data.”⁴

Advocacy submits that NMFS’s lack of adequate data may have a negative impact on small entities associated with the fishing industry. Without adequate data, NMFS cannot determine the appropriate course of action for protecting the species and the fishing industry. Proper science will produce a better foundation for action and aid NMFS in performing a more accurate economic analysis for its compliance with the RFA.⁵ The proper science may also assist NMFS in developing and implementing less burdensome regulatory measures that may be beneficial to the fishing industry.

Several other concepts were discussed at the hearing that may also be helpful to small entities. Advocacy supports not only the implementation of legislation which will assist NMFS in obtaining and using the reliable science, but also other concepts that may assist in rescuing the fishing industry from its current state of crisis.

If you have any questions about this matter, please feel free to contact me at (202) 205-6533. Thank you.

Sincerely,

THOMAS M. SULLIVAN,
Chief Counsel for Advocacy.

JENNIFER A. SMITH,
Assistant Chief Counsel for Economic Regulation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY CHRIS OLIVER
TO DAVID BENTON*

Question 1. In 2000, Ray Kammer of the National Institute for Standards and Technology released the report, “An Independent Assessment of the Resource Requirements for the National Marine Fisheries Service.” This report made a number of recommendations for improving NMFS’ management. What is limiting NMFS’ ability to further implement some of these recommendations? Which of the recommendations do you think NMFS should focus its attention?

Answer. As stated in written testimony, a major impediment to NMFS implementing recommendations lies in the regulatory process mandated by NEPA, and the related litigation which takes advantage of the mismatch between our process as outlined under MSA, and that which is required by NEPA. Excessive layers of review within NMFS, NOAA GC, DOC GC, and OMB further frustrate the process. The unique nature of our process makes it very difficult to fully comply with all provisions of NEPA, even when we are complying with the spirit intended.

Question 2. One of the Kammer report’s recommendations was to increase the resources devoted to towards providing better quality socioeconomic analysis to address requirements such as the Regulatory Flexibility Act and National Standard 8 of the Sustainable Fisheries Act. While NMFS acknowledges that socio-economics is important, they have yet to demonstrate that socioeconomics is a top NMFS priority, particularly when it comes to funding. Exactly where does socio-economics fit into the councils’ list of priorities? From a council viewpoint, is socioeconomics given enough importance by NMFS? What kind of socio-economics program would be helpful to the councils?

Answer. Current restrictions in the MSA on collecting economic information (from processors) impedes our ability to fully address these requirements. However, even with a relaxation on that restriction, we are a long ways from being able to conduct fully comprehensive assessments of socioeconomic impacts for every action. In some cases, the information does not exist, or only allows for qualitative, cursory assessments. Emphasis on social and economic analysis, and hiring of analysts in these fields, appears to remain a lower priority for NMFS. Thousands of biologists are currently employed by NMFS, but only a few dozen sociologists and economists nation-

⁴ Testimony of Dr. William T. Hogarth, Assistant Administrator for Fisheries before the Subcommittee on Oceans, Atmosphere and Fisheries, Commerce, Science and Transportation Committee, U.S. Senate, Washington, DC, May 9, 2002, pages 5–6.

⁵ Ray Kammer, consultant to the panel of the National Academy of Public Administration that is reviewing NMFS under a charge from the House and Senate Appropriations Committees, identified the RFA as being one of seven major laws that have a significant impact on NMFS operations. Testimony before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Oceans, Atmosphere and Fisheries by Ray Kammer, May 8, 2002, pages 3–4.

* Due to Mr. Benton’s unavailability, not all of the questions are provided with complete answers.

wide. Our Council staff currently has three staff members in this area, or about 30 percent of our professional, analytical staff resources. A majority of the analyses in this area are conducted by these relatively tiny Council staffs (5–8 analysts overall per Council on average), or through outside contracting. Greater assignment of economists and sociologists from the regional science centers to Council activities would be helpful.

Question 3. The Kammer Report recommended that NMFS implement a comprehensive stock assessment improvement plan that would enable NMFS to address its need for better resource information. Better stock assessments will help bring science to the forefront. From a council viewpoint, how would a comprehensive stock assessment improvement plan be helpful? What do you see as the roadblocks?

Answer. Our region currently has a well-respected, comprehensive stock assessment program.

Question 4. Cooperative research programs serve the dual purposes of promoting mutual understanding between scientists and fishermen (thereby improving relationships and reducing conflict) and serving programmatic data collection needs. Expanded efforts in both of these areas were recommended in the Kammer report on NMFS. From a council's perspective, where do you see needs for new or expanded cooperative programs? Do we need a national program for further developing cooperative research? Can you tell us about some of the impacts you've seen from current cooperative programs?

Answer. We believe that information from fishermen should be utilized to a greater extent. It is unclear whether a national level program is the most appropriate way to address the issue, as opposed to a more regionally tailored approach.

Question 5. The issues you face with the North Pacific council are in many ways different from those faced by other councils. Therefore, in creating federal fisheries management laws, we must strike a balance between meeting national standards and maintaining regional flexibility. This can become difficult for an issue like capacity reduction. Even though capacity problems may vary among regions, there may be some rationale for having a nationally-coordinated and consistent program for reducing excess capacity. From the council's viewpoint, how do we strike the balance between national coordination and regional flexibility? Would a nationally coordinated capacity reduction program be effective at reducing some fishing pressures? How should such a program be designed?

Answer. Again, we believe that regional issues warrant regional solutions. In our region we are already well on our way to reducing overcapacity through existing programs. It is important to note that, in some regions, overcapacity is viewed as a resource conservation issue; i.e., it contributes to overexploitation and other conservation concerns, while in some regions (those who operate with strict catch and bycatch quotas) overcapacity is simply an economic issue (albeit an important one). We believe that each region should be given the ability/opportunity for buy-back programs, but we do not support a national-level program.

Question 6. Since the **fisheries** management council structure was created, councils structure and function have been the subject of great scrutiny. We know councils have been handed more responsibility over time, and the FY03 budget request includes an increase of \$1.9 million for each council to help meet their increased workload. From your viewpoint, are councils empowered with the authority they need to do effectively manage fisheries? If you could improve on the council structure or function or support in any way, what would you do? Do you think council membership truly reflects those who are most affected by the fisheries? If not, does this tend to vary by region? How would you improve stakeholders' representativeness?

Answer. The fisheries management process has, in many ways, outgrown the infrastructure of the Councils and NMFS. Additional funding is certainly helpful, but does not alone solve this problem. The threat of litigation, the ever-growing analytical demands to fully comply with various laws and avoid litigation, and the ever-growing review role and authority of NOAA GC appear to be outpacing the funding and infrastructure. We believe the current Council structure in the North Pacific does indeed reflect those most affected by the fisheries. We also support the current process for appointment of Council members.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN F. KERRY
TO DAVID BENTON

Tools Needed to Improve Compliance

Question. Ms. Iudicello states that the existing compliance system isn't always well implemented. She also concludes that while the system does not need to be changed, we do need to change the tools and resources we provide to NMFS and the Councils.

Do you agree?

What are the tools and resources you see as being essential to this task?

Given the current litigation burden, is this possible?

Do you see statutory changes being needed to accomplish this?

Answer. It is unclear what Ms Iudicello is referring to with regard to the phrase "existing compliance system." Therefore, I cannot answer this question, other than to make the general statement that statutory change is necessary to clarify the authority of the Magnuson-Stevens Act, relative to NEPA. For example, we believe that compliance with the MSA and National Standards satisfies 95 percent of the letter of NEPA and 100 percent of the intent of NEPA.

Socioeconomic Analysis

Question. From reading the "Kammer Report" and other reviews, we appear to lack the infrastructure necessary to systematically conduct socioeconomic analyses mandated under the Regulatory Flexibility Act and National Standard 8 of the SF. Each Stock Assessment and Fishery Evaluation report (SAFE) is required to summarize the social and economic condition of the fishery's recreational, commercial, and processing sector, as well as the most recent biological status of the fishery.

Does NMFS currently perform any social science evaluations at the regional level?

Answer. I understand that NMFS recently hired a social scientist at the Alaska Fisheries Science Center. It is unclear what role that person will play in the management process. I am unaware of any social science evaluation that occur at the regional level. Most of the work in this area has been conducted by the Council staffs, or under contract by the Council.

Question. From your point of view, are Councils better equipped for this than NMFS?

Answer. Presently, none of us are adequately equipped to address this aspect of fisheries management. Again, with the very small size of Council staff we cannot afford a full-time sociologist, and most of the work is done under contract.

Question. Based on the variations in current Councils make-ups, are the personnel in place in each of the regions to adequately perform the requirements under Standard 8 of the SFA?

Answer. Absolutely not. Variations in Council make-ups have little or no relevance to staffing in the NMFS regions.

Council Accountability

Question. While a number of entities may be affected by or have defined roles in the decision-making process, legal accountability is construed narrowly. The result is that participants such as the regional fishery management Councils are important in formulating fishery regulations but are not formal participants in a legal challenge, even if they are willing to be. Similarly, the Councils have no legislatively defined role in development of a biological opinion under the Endangered Species Act for fisheries that affect a listed species.

What can be done to address this issue of accountability?

Answer. While the Councils likely do not want to be the direct subjects of litigation, we do believe we have a legitimate role in the development of Biological Opinions that is not being recognized by NMFS. The legal standing and role of the Councils, and their stature as an 'executive agency of the Department of Commerce', needs to be clarified.

Question. Have you identified how NMFS can address the concerns of the lack of accountability without adding to the complexity of management?

No answer.

Question. Do you still consider the Councils to be the proper mechanism for regional representation?

Answer. Absolutely.

Question. If so, how do you respond to criticisms of the Council process—including representativeness—and suggest repairing confidence among stakeholders?

Answer. Some of the criticisms of the Council process are really misdirected criticisms of the outcomes of the process; i.e., if the Council process is not doing what some folks want, or not doing it fast enough, they claim the process is flawed. The current process allows for State Governors and the Secretary to achieve proper representation on the Councils. The unique nature of our process, and the time required for promulgating regulations under this process, means that stakeholders have to display a level of patience. They also have to participate in the current public process, rather than shoot at it from the sidelines.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN F. KERRY
TO RAY KAMMER

Tools Needed to Improve Compliance

Ms. Iudicello states that the existing compliance system isn't always well implemented. She also concludes that while the system does not need to be changed, we do need to change the tools and resources we provide to NMFS and the Councils.

Question. Do you agree?

Answer. I agree that the compliance system is not always well implemented. I also agree that modern equipment such as the Vessel Monitoring System (VMS) and additional resources are also needed. I think that there are opportunities to expand the use of Joint Enforcement Agreements (JEA) and Cooperative Enforcement Agreements (CEA). I am also concerned about the downward trend of U.S. Coast Guard assistance in supporting NMFS regulations. The number of cutter hours devoted by the USCG to NMFS enforcement has declined by 25 percent in the last six years and it appears that support will decline another 12 percent this year.

Question. What are the tools and resources you see as being essential to this task?

Answer. NMFS needs USCG support to achieve compliance. If this is no longer possible because of the necessity to focus the USCG on other priorities, I think that NMFS should consider contracting for enforcement rather than attempting to staff up and acquire more vessels.

VMS, JEA's and CEA's are all successful enforcement strategies and I believe should be expanded. I believe that VMS will be discovered to be the most cost beneficial choice in many circumstances where it is not now used.

Question. Given the current litigation burden, is this possible?

Answer. The litigation burden is onerous. Each case appears to require the attention of two NMFS staff members full time. So about ten percent of the staff is focused on litigation. The litigation is not likely to go away quickly. I think that contracting tasks out is the most likely strategy to work in the next few years.

Question. Do you see statutory changes being needed to accomplish this?

Answer. No, I do not think that statutory changes are needed to enforce NMFS regulations.

Measurable Performance Criteria

While the SFA required NMFS to establish objective and measurable criteria to evaluate rebuilding progress, many believe that there is also a need to evaluate the effectiveness of the science and the management system itself, to promote continuous improvement of the system. We also want to have continuous improvement in our management measures—i.e., use “adaptive management”.

Question. What kind of a performance review would be appropriate for the agency and the Councils?

Answer. I believe that the Assistant Administrator for NMFS should hold annual program reviews using announced criteria to evaluate all of the NMFS programs for effectiveness and value and share the results with the NMFS staff.

I also recommend that NMFS commit to annual external reviews of both management and science with publicly available reports of findings and recommendations.

Question. Given some of our data and analytical gaps, the variability of projections, and the interest in using “adaptive management”, do you think that we should try to agree on interim performance measures toward rebuilding goals?

Answer. Absolutely yes, I think that key to improving NMFS is committing to making systems and programs better rather than trying for a perfect and complete solution that will never be within reach.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE
TO RAY KAMMER

Need for Resources to Improve Socio-economic Analysis

In your report, one of the recommendations was to increase the resources devoted toward providing better quality socio-economic analysis to address requirements such as the Regulatory Flexibility Act and National Standards 8 of the Sustainable Fisheries Act. I believe we have to better understand these socio-economic factors if we are going to improve fisheries management. In the study you and your team recommended an increase in socio-economic analysis by \$10M. When we look at the Administration's Fiscal Year 2003 budget proposal, we see a total of \$4 million recommended for socio-economic analysis, which is only an increase of \$1.5 million over the previous year.

Question. What should be NMFS' plan for developing a comprehensive socio-economics program? What additional resources should we direct toward this, both in the short and long term?

Answer. I continue to believe that a total socio-economic program of \$12.5 million is justified. I also recommend that most of the funding be spent on grants to Universities in the affected regions to do the analyses. I believe that this approach will be quicker, cheaper and result in a more informed product.

Improving Education and Scientific Qualifications Within the NMFS Workforce

Question. Another one of your report's recommendations was to increase the education level and the level of science within the NMFS workforce. NMFS personnel work in a very specialized field in which corporate knowledge is critical. The report also revealed that the most critical personnel shortages are in the areas of stock assessments and socio-economics. It is not a coincidence that these are the areas where NMFS has its greatest deficiencies. These problems are further exacerbated by the fact that 47 percent of the entire NMFS Ph.D. population is eligible or will soon be eligible for retirement. What should NMFS be doing to implement these recommendations and better hire and retain the personnel it needs to carry out its mandates? I understand that funding limitations are contributing to this problem. What increases in funding do you think NMFS needs to maintain its workforce? Should NMFS establish training centers for its employees? What other ways could NMFS improve its training? What other obstacles is NMFS facing in improving the caliber of its workforce?

Answer. The total number of qualified fish population modelers in Government and University is about 200 people. A few new PhD's in this area are awarded each year. The current circumstances will not yield qualified people in the numbers that NMFS needs. I believe that NMFS will have to make a long term granting commitment to appropriate degree granting departments in Universities to increase the number of PhD's in the desired disciplines. \$20M a year in grants to Universities would make a huge difference in this area.

NMFS can also support the Universities programs by sending its staff to Universities to be trained. The relationships established while the NMFS staff is educated will yield continuing value for NMFS.

Morale in NMFS is not good. I think that staff is daring to hope that they will have the resources to do their jobs because of Congressional support and engaged and capable leadership. NMFS has a unique and exciting mission that will continue to attract staff. I believe that if the resources are available to accomplish the NMFS mission, NMFS will be able to attract and keep high quality people.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN F. KERRY
TO SUZANNE IUDICELLO

1. Need for Statutory Changes

Question. Some claim the increase in litigation demonstrates the need for changes to the Magnuson-Stevens Act—either to make it more stringent or to make management more flexible. Others believe most problems can be addressed through internal reforms, with some minor changes to the law. Still others see that the problems will not be addressed by single statute changes, but that a comprehensive legal regime may be needed as the nation moves toward ecosystem management.

In view that the Agency and others have expressed a need for greater flexibility in management, what legislative changes would facilitate the flexibility necessary to streamline the regulatory process?

Answer. I do not see any need for statutory change to accommodate existing legal requirements on the National Marine Fisheries Service. To say that either the National Environmental Policy Act or the Magnuson-Stevens Fishery Conservation and Management Act must be amended because the agency is losing lawsuits is akin to saying we have to raise the speed limit because too many speeders are getting tickets. If NMFS follows the law, they may get sued, but they won't lose.

Both NEPA and M-S FCMA contain sufficient flexibility to be synchronized and integrated. In fact, you can see by the attached diagram that NMFS already has advised the councils and staff who prepare fishery management plans on how to integrate NEPA analysis with fishery management planning. As early as 1991 the Assistant Administrator announced to Regional Directors a policy of evaluating the impacts of fishing on the environment and protected species through EAs and EISs, and provided guidance in an Administrative Order dated June 21, 1991.

What recent litigation is about is not the incompatibility of marine living resource statutes, it is about non-compliance with those statutes.

The difficulty most cited by council and agency staff is one of timing. They claim that they cannot mesh the timelines and respective requirements for notice, scoping and comment periods of NEPA and M-S FCMA. Council and agency staff will point out that periodic stock assessments are conducted in the summer, results are available in the fall, council decision meetings occur in November or December, with decisions on TAC-setting necessary by the beginning of the year for many fisheries, at latest by early spring. They state further that this 4-6 month time frame does not provide sufficient time to conduct the kind of environmental analysis anticipated by NEPA.

This characterization fails to recognize that there is more than one alternative to preparation of a full EIS for every annual adjustment of the catch quota. It does not take into account the possible use of programmatic EIS's, nor does it clearly grasp what NEPA is aiming for in analysis of the "proposed federal action."

In my view, the "federal action" at hand is authorizing fishing, not bumping a TAC up or down by a few thousand pounds in response to a new stock assessment every autumn. The decision to authorize fishing—or not—does not need to be made on an annual basis, and in fact, could be made relative to a sustainable fisheries program, a stock recovery policy, a regional or ecosystem program, a capacity reduction program, or a target range for catch for a period of years. If the agency does a thorough job of environmental analysis in a set of programmatic or supplemental EISs on entire fisheries, or overall fishery management plans—not on an amendment that changes mesh size or ups the catch—such a document would provide the foundation for subsequent EAs and FONSI's or for tiering. (See 40 CFR 1502.20, 1508.28; 40 Questions #24(c)).

One of the other areas most often cited as presenting timing difficulties is the triggering of Section 7 Consultation under the Endangered Species Act. The issue is that the Office of Protected Resources is not called upon to provide consultation on effects on endangered species until a preferred alternative has been selected by a council. This puts off the sharing of information, advice, and consideration of an array of conservation or mitigation measures until late in the decision process. If it turns out the preferred alternative is likely to cause jeopardy, participants in the process are left with the feeling they were "sandbagged," that they have to go back and begin again, only to wait until the last minute for another jeopardy opinion.

The problem arises more from the area of fiscal and personnel resources than statutory disconnect, however. Nothing in the ESA prohibits staff in the Office of Protected Resources from informally consulting with councils and fishery managers before an action is defined precisely. If OPR had staff to provide expertise and liaison with councils and fishery managers on an ongoing basis, rather than after a specific alternative needed to be analyzed in a biological opinion, the factor of "surprise" late in the decision process could be avoided. The key question is how can NMFS provide the councils with information on impacts of fishery management measures to threatened and endangered species associated with the full array of alternatives before they select the preferred alternative? This, too, is possible without statutory change.

In my view, the current hand-wringing about "incompatible mandates" and "irreconcilable timelines" has gone on long enough. It's time for managers to find a way to get thorough environmental analysis done in a way that informs their decisions, not thwarts them. NEPA, ESA and M-S FCMA give them a framework to do that, NMFS guidance provides the nuts and bolts of how to do it, and CEQ has repeatedly offered its assistance to help find additional flexibility where needed.

2. Council Accountability

Question. While a number of entities may be affected by or have defined roles in the decision-making process, legal accountability is construed narrowly. The result is that participants such as the regional fishery management councils are important in formulating fishery regulations but are not formal participants in a legal challenge, even if they are willing to be. Similarly, the Councils have no legislatively defined role in development of a biological opinion under the Endangered Species Act for fisheries that affect a listed species.

What can be done to address this issue of accountability?

Have you identified how NMFS can address the concerns of the lack of accountability without adding to the complexity of management?

Do you still consider the Councils to be the proper mechanism for regional representation?

If so, how do you respond to criticisms of the Council process—including representativeness—and suggest repairing confidence among stakeholders?

Answer. The ambiguity of roles and responsibilities between councils and NMFS, between regions and headquarters, between Office of Protected Resources and Office of Sustainable Fisheries has evolved because over the years no one at NMFS asserted leadership or demanded accountability from the councils. The councils accreted authority as NMFS abrogated it. As I read the M-S FCMA and its 20-year legislative history, the idea was to use the regional, hands-on expertise of the councils and their representative process to develop plans. No where do I find a basis for delegating to these bodies the authority of final decision-making, promulgating regulations, standing as the government in court, or developing biological opinions under the ESA. The councils advise the agency. The agency is the decision-maker. But in practice, if councils did not produce documents up to the standard of quality called for in law, regulations and guidance, NMFS did not disapprove them, as it was required to do, but let them go by. NMFS (not the councils) got sued, the actions and decisions of record did not pass muster, NMFS paid the consequences. Dr. Hogarth has stated that this way of doing business is over. He has made clear to regional directors, councils and senior management that incomplete documents, insufficient records of decision, non-compliant management measures will not slide through. If he sticks to his guns, the issue of accountability will be resolved, because he has stepped up to the plate and said he will be accountable and will hold staff and councils to be accountable also. Your question has four parts:

Question. What can be done to address this issue of accountability?

Answer. The Congress can support the Assistant Administrator in his stance of accountability and hold him to it. Support includes appropriations, oversight, communication, and respect for what are legislative decisions and what are administrative ones. Micro-managing or trying to legislate every decision the agency must make has contributed to the current ambiguity. Stakeholders believe (because they have seen evidence) that whenever they don't like an agency decision they can run to their elected officials and get it changed. This has undermined confidence and leadership.

Question. Have you identified how NMFS can address the concerns of the lack of accountability without adding to the complexity of management?

Answer. The Kammer report targets a number of actions that can be taken to remove the layers of review through which fishery management plans and amendments must struggle. In addition, NMFS staff identified in several workshops a number of actions to enhance "front end" communication and review, before documents and proposed actions are developed in detail. I assume that many of these are incorporated in "Dr. Hogarth's Plan" you refer to in Question 3. NMFS staff from regions, headquarters, science centers and various offices also developed with council executive directors and chairmen a list of actions that would more clearly define roles, including where regional diversity is important and where consistency is important. For example, the decision as to whether council staff, contractors, or agency staff prepare EISs for management plans is one that can be made by the various councils depending on their particular staffing and expertise. *What is in the documents*, however, needs to be consistent across regions and must be vetted by the agency, which is the accountable decision maker. All of these suggestions were written up following the workshops in May and July of 2001 and provided to Dr. Hogarth.

Question. Do you still consider the Councils to be the proper mechanism for regional representation?

Answer. Yes. If so, how do you respond to criticisms of the Council process—including representativeness—and suggest repairing confidence among stakeholders?

If there were an area where statutory change could be useful, this is probably it. First, the agency, not the councils, should clearly have the authority to set an overall catch limit. A consultative process using existing advisory panels, scientific and statistical committees could interact with the agency, but at the end of the day, it must be the Secretary of Commerce/NMFS AA that says how many fish. Then it is up to the council to decide by whom, by when, and how. If the political climate is not such that this change can be made in the law, then it goes back to the overall question of accountability: if a council sets a TAC that clearly violates a National Standard, the agency must be able not only to disapprove the FMP or amendment, but to send it back to the council with a recommendation on what will pass muster and why. Secondly, there needs to be a reconsideration of the nomination of possible council appointees by the governors. We heard testimony at the May 9 hearing that some governors repeatedly submit the same names though they are rejected by the Secretary of Commerce and do not meet the M-S FCMA's requirement to "ensure a fair and balanced apportionment" among stakeholders. The notion that seats be designated in the Act for various interests has never gained much support. Perhaps one or two at-large seats could be reserved for the Secretary's discretionary appointment as needed to ensure balance?

3. Coordinating Marine Statutes

Question. At the hearing, you and Ms. Dalton both discussed the need for coordination or integration of statutes governing management of living marine resources.

Do you think Dr. Hogarth's plan fully achieves this goal?

If not, what can we reasonably expect from the plan, and by when?

What additional actions and processes will be required to achieve integration in the long-term?

Who should be involved in these efforts?

Answer. Since I am not familiar with "Dr. Hogarth's plan" for coordination and integration of statutes governing management of living marine resources, I cannot comment on the first part of your question. Regarding additional actions and processes to achieve integration in the long term, there are a number of avenues to consider. First, two commissions, one congressional and one private, are now deliberating management of both living and non-living ocean resources. Their recommendations should be considered in discussions. Furthermore, the National Marine Fisheries Service is drafting guidance for incorporating ecosystem-based approaches into fishery management. This effort, which draws substantially from the report prepared for Congress on this subject, will provide additional ideas for consideration.

Marine resource statutes contain directives to managers to consider the ecosystem. Yet these laws produce management regimes that focus on single species or species complexes. Some emphasize yield and management, others focus on recovery or protection, still others on coastal development or multiple use. What are we saying about overall U.S. policy toward the marine environment (if we even have an overall policy)? Where do the approaches converge or conflict? Do we have any mechanism to integrate them? If not, should we? These are questions that could be asked in the context of reauthorizations, or in consideration of some new enabling legislation for a comprehensive living marine resource program, or in further consideration of ecosystem-based approaches.

4. Measurable Performance Criteria

Question. While the SFA required NMFS to establish objective and measurable criteria to evaluate rebuilding progress, many believe that there is also a need to evaluate the effectiveness of the science and the management system itself, to promote continuous improvement of the system. We also want to have continuous improvement in our management measures—i.e., use "adaptive management"

What kind of a performance review would be appropriate for the agency and the Councils?

Given some of our data and analytical gaps, the variability of projections, and the interest in using "adaptive management, do you think we should try to agree on interim performance measures toward rebuilding goals?

Answer. Before you can measure performance, you must establish the criteria against which you will evaluate it, which may be the toughest step in moving toward evaluation. Chapter 8 of *Fishing Grounds* is devoted to the idea of adaptive management, performance measures and evaluation, and is directly responsive to the first part of your question. We concluded that routine evaluation is a necessary part of helping managers determine whether they have been effective. But even those who agree with the idea of evaluation admit that it would be difficult. It re-

quires data, criteria and analysis, and at the outset a set of objectives we can all agree would be the standard against which management is evaluated—not just biological objectives, which we have in the National Standards and Guidelines—but also economic and social objectives. These have yet to be articulated in fisheries in each region.

With regard to your specific question about interim performance measures toward rebuilding goals, this might be useful in determining whether management measures have rebuilding on course. I would be careful, though, of creating yet another litigable standard.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE
TO SUZANNE IUDICELLO

Question 1. NMFS has received many recommendations to increase the resources devoted toward providing better quality socio-economic analysis to address requirements such as the Regulatory Flexibility Act and National Standard 8 of the Sustainable Fisheries Act. We have to better understand these socio-economic factors if we are going to improve fisheries management. Fisheries management directly affects—and is affected by—people and their communities. What should be NMFS' plan for developing a comprehensive socio-economics program? What additional resources should we direct toward this, both in the short and long term?

Answer. A first step in developing a comprehensive socio-economics program would be a commitment to having one. NMFS has increased its personnel and resources dedicated to collecting and analyzing social and economic information over the past several years, but it is not clear that there is a plan or strategy for getting the job done or how that job responds to what fishery managers need to know in order to do their jobs. A second step would be an analysis of what information is needed, where it fits in the fishery management process, and what is needed to acquire it. For example, some information is not available because the agency hasn't had time or resources to collect or compile it. Other information cannot be gathered because of legal constraints, considerations of privacy and proprietary information and so forth. Something that might be explored is whether there are resources or expertise at the Bureau of the Census (also in Department of Commerce) that might be called upon to help NMFS design a program, or to provide information that is collected for other demographic purposes and that can be useful for purposes of defining fishing communities and so forth. As to the specific question about additional resources, it seems you would want first to see a plan: what information is NMFS trying to gather and analyze, what do they need to acquire it, how will they go about doing that, by when, and so forth.

Question 2. Our ability to manage our fisheries stocks is significantly hampered by the amount of by-catch that is often caught in individual fisheries. By catching the wrong fish or catching targeted fish that are too small we are increasing the mortality for fish that won't even go to market. In a multi-species fisheries such as New England groundfish, the by-catch of species such as cod is hurting our rebuilding efforts. How can we improve these efforts to reduce by-catch? In what ways can we encourage fishermen and scientists to research more and better ways to reduce by-catch? What incentives can we provide fishermen which will help encourage by-catch reductions?

Answer. One of the best bycatch reduction incentives I have seen to date was that associated with the openings of scallop areas that had previously been closed on Georges Banks. In this case, the scallop opening lasted until a specific bycatch cap of yellowtail flounder was reached, resulting in landings of 6 million pounds of scallop meats worth about \$36 million. With the incentive to keep the lucrative scallop fishery open as long as possible, fishermen employed techniques, such as communicating among themselves to avoid "hot spots" where they were taking flounder in association with the scallops. The bycatch cap wasn't hit until November, and they cut bycatch rates of yellowtail to well below what had been predicted. Similar techniques are used in the North Pacific, where bycatch caps, communication among fishermen, peer pressure, real-time information, observers and gear changes have reduced bycatch rates significantly.

Question 3. In creating federal fisheries management laws, we must strike a balance between meeting national standards and maintaining regional flexibility. This can become difficult for an issue like capacity reduction. Even though capacity problems may vary among regions, there may be some rationale for having a nationally-coordinated and consistent program for reducing excess capacity. One of the concerns raised whenever the issue of overcapacity comes up is the loss of the smaller

fishermen and their coastal communities. How can we better address this issue of overcapacity, without overlooking the socio-economic effects? How can we preserve our historic, small fishing operations while at the same time reducing pressure on the fisheries?

Answer. Decisions about the fall-out of capacity reduction on coastal communities can and should be made at the local level. I believe it is possible to set national standards and priorities for capacity reduction, for example, what do we mean by a unit of effort, by how much do we need to reduce capacity as expressed by amount of effort required to take OY, what will be a standard formula for a combination of government and industry support for buyouts, how will licenses and latent effort as well as vessels be handled, what will be the standard processes for bidding in buyouts and so forth. This is necessary so that all regions have an equitable position in their capacity reduction efforts, so that vessel owners are treated fairly in the process, and the public gets a fair return if tax dollars are used to retire effort. When it comes to what the fishery should look like after those who want out can do so, that should be flexible, regional, and decided at the community level. So, for example, if Region X needed to reduce capacity by 60 percent in order to bring effort in line with yield in the fishery, it would be up to local people to decide what the fleet looked like when the reduction was over: the mix of vessel sizes, gear types and so forth. This kind of discussion should occur at the council level or even more locally; port by port. One region might want one, gigantic catcher-processor while another might prefer 60 30-foot hand-liners. As long as the catch in the fishery was within sustainable levels and the effort was curbed to the point that vessel operators could make a profit without overfishing, in my view it is purely a local decision how the fishing gets done. It seems to me that we have been unable to discuss this issue nationally (or rationally!) because every time one region has a desire to reduce capacity or devise a quota system for its own fleet, they are blocked because another region doesn't want to allow it, even if no one is compelling them to do so in their home territory. It is just as unfair for one region to thwart another in its local desires and decisions to undertake capacity reduction as it would be for a national program to force a uniform reduction program on every region. Effort reduction needs to happen in fisheries on every coast in the U.S. It is time for coastal communities to articulate what they want their fleets to look like when they are profitable and matched to the fishery resource instead of continuing to block discussion of the issue because they fear some imagined outcome.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN F. KERRY
TO PENELOPE DALTON

Role of Ocean Commission

As NMFS and the Councils struggle to fulfill basic, and often conflicting, statutory mandates, it is obvious that there is also an urgent need for development of a workable and coordinated management regime for all living marine resources. But as Dr. Hogarth observes, this kind of thinking requires a "time out."

The National Commission on Ocean Policy, created under the Oceans Act of 2000, is planning to address some long-term issues.

Question. Should we ask the Commission to convene an outside group of resource management experts and scientists to look at these questions, in consultation with some agency and counsel personnel?

How else can this Subcommittee assist in this long-range planning effort?

Answer. The National Commission on Ocean Policy represents a unique opportunity to take a fresh look at U.S. management and governance issues related to living marine resources. Such issues have been a primary focus of testimony at Commission regional meetings and in the questions raised in its interim report, "Toward a National Ocean Policy." Given this national interest, it would be constructive to request that the Commission convene a group of independent experts, from both inside and outside the government, who are familiar with current management regimes. The group would work to develop policy options for responding to the issues raised and for exploring more coordinated and integrated management. One challenge for the group would be to work through issues on a timeline that is responsive to the Commission's very tight schedule for completing its work. Another challenge would be to define an appropriate scope of discussion. While the activities of the National Marine Fisheries Service and the Councils are central to development of a comprehensive management regime, other parts of NOAA also must be involved, as well as other federal agencies, state officials and stakeholders.

The Subcommittee on Oceans, Atmosphere and Fisheries will continue to have an important role in this long-range planning effort through continued oversight of NMFS activities, consideration of new legislative approaches, and sponsorship and participation in the working group.

Need for Statutory Changes

Some claim the increase in litigation demonstrates the need for changes to the Magnuson-Stevens Act—either to make it more stringent or to make management more flexible. Others believe most problems can be addressed through internal reforms, with some minor changes, but that a comprehensive legal regime may be needed as the nation moves toward ecosystem management.

Question. This Committee has been of the general opinion that the provisions of the Sustainable Fisheries Act should be fully implemented before we could determine the results of the Act. Being that you are involved in both the development of the legislation and its initial implementation, can you share with us how you would respond to these diverging views on statutory needs?

Answer. There is neither a single cause nor a simple solution to the upsurge in litigation over the past five years. As the recent report of the National Academy of Public Administration (NAPA) indicates, the Magnuson-Stevens Act provides the basis for less than half the legal challenges of NMFS decisions or about 40 percent of the litigation from 1997 through 2001. NAPA characterizes the increases in Magnuson-Stevens Act challenges as “modest” and cites major increases in cases based on a number of other statutes such as the National Environmental Policy Act, the Endangered Species Act (ESA), and the Regulatory Flexibility Act. The diversity of this litigation gives rise to a wide range of environmental, social and economic consequences when an adverse court ruling occurs. For example, although Magnuson-Stevens Act actions comprised the largest caseload during my tenure with NMFS, adverse outcomes on ESA cases generally had more serious implications for NMFS and affected communities. In addition, over time the agency has lost more than 60 percent of the ESA cases initiated, so even though more actions are brought under the Magnuson-Stevens Act, the loss numbers under the two statutes are roughly comparable. This situation illustrates the importance of dealing with litigation comprehensively and to the extent possible through internal agency administrative reforms rather than relying on specific changes to individual laws.

With respect to the Magnuson-Stevens Act, both the amendments made by the Sustainable Fisheries Act and implementation of those amendments have contributed to the increase in litigation. The 1996 changes were the most significant revision of the Magnuson-Stevens Act since its enactment in 1976. Consequently, some litigation was expected. One goal of the Sustainable Fisheries Act was to ensure that the Councils and NMFS took timely action to prevent and end overfishing, rebuild fishery stocks, and develop management plans. The intent was not to completely redo every fishery management plan, but rather to mandate that necessary elements of a management regime, such as overfishing definitions, were in place for each fishery. Nor were the revisions intended to eliminate all flexibility on the part of the Councils and NMFS in dealing with complex issues such as multispecies management and rebuilding plans. However, NMFS gave up significant agency flexibility in its initial efforts to establish clear implementation guidelines and substantially increased information requirements. The result has been increased pressure on NMFS resources and a strain on its relationship with the Councils. Dr. Hogarth currently is completing a review of implementation issues that could lead to revision of the guidelines or recommendations for changes to the law.

The Future of U.S. Fisheries

Some suggest that an agency straining to meet legal mandates, respond to litigation and implement administrative changes, is not in the best position to take a long, critical look at needed reforms over the next 5 to 10 years.

Question. Based on the testimony here today, I can see that the need exists to look at the full universe of options to address our future needs. Do you feel that NMFS is in the proper place to develop such a plan internally or is this something that would be better suited to outside or Congressional assistance?

Answer. NMFS currently is focused on meeting current missions and responsibilities, streamlining regulatory processes, strengthening outreach and communications, and improving its science. These activities are essential to meet the agency's immediate needs and should place it on a sounder footing for the future. At the same time, the crush of short-term demands leaves the agency with little time or resources for looking strategically 5 or ten years down the road.

As I stated in my written testimony to the Committee, what is needed is an opportunity for the agency to work with its constituent groups to define long-term priorities, develop a strategy for a coordinated program to improve our understanding and sustainable use of living marine resources, and begin the transition to ecosystem-based management. I don't think that this can or should be done as an internal agency exercise, but it is essential that NMFS staff participate—not as agency representatives but as experts on the science and management of fisheries. The Commission on Ocean Policy and the Congress clearly could provide both a forum and an audience for such a process. The process could be convened under the auspices of these two entities, under an existing organization such as the Marine Fisheries Advisory Committee, or through a grant or contract with an external non-governmental organization. The strategy must address still unresolved issues such as overcapacity and access in fisheries, user fees, agency and organizational roles, and the transition to ecosystem-based management. It would be intellectually challenging to develop and politically difficult to implement, but offers real promise for ending the current reliance on crisis management. Once the priorities and strategy are established, it will be necessary to evaluate our current laws and practices and make necessary changes. As part of the evaluation, consideration should be given to the development of new legislation that would incorporate existing single focus laws into a single, ecosystem-based marine resource management statute.

Innovative Techniques

Mr. Benton outlined some impressive accomplishments in the Alaska groundfish fishery that seem to be entirely appropriate for use in all parts of the country—including New England. I am particularly impressed by the bycatch reduction and the independent scientific review process in the North Pacific Council. I also understand that they are also pioneering work in ecosystem management.

Question. What are the barriers to making these techniques work in a fishery like the New England groundfish fishery?

How close are we to getting to multispecies management in the North Pacific?

Would it be beneficial to get the North Pacific Council together with our New England council to discuss strategies that might be transferable?

What would you propose to move us along this path?

Answer. About two years ago, NMFS arranged for John Gauvin, Executive Director of the Groundfish Forum, to attend a meeting in Gloucester with local fishermen to discuss bycatch reduction. Mr. Gauvin has been at the forefront of efforts to reduce bycatch in North Pacific fisheries for several years. Members of the New England fishing industry seemed interested in his ideas but were somewhat skeptical about their applicability in the Northeast. Probably the biggest barrier to making new conservation techniques work in New England is differences in the management approach adopted by the two Councils. In the North Pacific fishery, bycatch limits often constrain fishermen's ability to catch the full allocation of the target species, so there is a real incentive for them to work cooperatively to provide real time information for avoiding bycatch "hotspots" and to develop technologies for reducing catches of prohibited species. Few similar incentives exist in New England. In addition, there are differences in fishing operations and in the vessels and gear employed in the two regions that may limit direct transfer of techniques from one region to the other. This is not to say that we shouldn't continue to work to improve communication of good ideas among the Councils and fishermen.

While there have been problems in a few North Pacific fisheries like crab and some salmon runs, the State of Alaska, NMFS and the Council have successfully maintained a conservative harvest regime that sustains numerous healthy North Pacific fisheries. In fact, the Marine Stewardship Council recently certified the Alaska pollock fishery. I would defer to Council and NMFS staff in the region on how close they are to multispecies management. One of the few positive aspects of the Steller sea lion crisis is that it has highlighted the need to incorporate broader ecosystem considerations into the North Pacific fishery management process.

I think it would be very beneficial to bring members together from all of the Councils to exchange regional strategies that work well. One way to do this might be to build on the ongoing Council Chairmen's meetings, expanding them to include a symposium or workshop on promising new conservation techniques and topics. Other possible mechanisms would be to encourage personnel transfers among the staffs of the Councils and NMFS, and to ask NMFS headquarters to establish a clearinghouse of successful management approaches that have worked in each region.

Council Accountability

While a number of entities may be affected by or have defined roles in the decision-making process, legal accountability is construed narrowly. The result is that participants such as the regional fishery management councils are important in formulating fishery regulations but are not formal participants in a legal challenge, even if they are willing to be. Similarly, the Councils have no legislatively defined role in development of a biological opinion under the Endangered Species Act for fisheries that affect a listed species.

Question. What can be done to address this issue of accountability?

Have you identified how NMFS can address the concerns of the lack of accountability without adding to the complexity of management?

Do you still consider the Councils to be the proper mechanism for regional representation?

If so, how do you respond to criticisms of the Council process—including representativeness—and suggest repairing confidence among stakeholders?

Answer. To answer the first question, it is necessary to recognize that there are different types of limitations on Council accountability. The first is the Councils' limited accountability to participate in litigation under the Magnuson-Stevens Act. While I'm not an attorney, my understanding is that the Councils have a legislatively defined role in the fishery management process, but are not proper defendants in a legal challenge against the Federal Government. This is because they are not considered to be federal decision-makers but rather advisory groups. The only way to alter that limitation would be to amend the Magnuson-Stevens Act to clearly vest them with federal regulatory authority. This would be a fundamental change in their position under the law that would require changes in the appointment process to avoid constitutional issues. The second is a limitation on accountability stemming from the absence of a defined Council role in laws such as the ESA. In the second case, accountability can be addressed administratively to the extent consistent with the underlying statute. This is the approach that NMFS is taking in situations like the Steller sea biological opinion for the North Pacific groundfish fishery. An alternative approach would be to amend laws like the ESA, similar to the amendment adding section 118 to the Marine Mammal Protection Act. This section, of course, establishes a specific regime for regulating the taking of marine mammals in commercial fishing operations. Either approach would provide NMFS and the Councils with greater accountability, but could add to the complexity of management.

The Councils really are a unique management structure, but we have made little effort to objectively evaluate them. When they work well, as in the case of the North Pacific and South Atlantic Councils, they offer constructive and effective systems for resolving management issues and maximizing stakeholder participation. On the other hand, the Councils struggle with persistent problems like unbalanced representation among interest groups, conflict of interest concerns, and uneven work loads. As Senator Breaux pointed out at the hearing, many of the provisions applicable to Council selection have been revised in almost every Magnuson-Stevens Act reauthorization. In preparing for the next authorization, it might be useful to ask an appropriate group to develop objective performance standards and criteria and conduct an independent evaluation of the effectiveness of each Council. The results could be used to make adjustments to individual Council areas of responsibility, increasing accountability and pulling them together in a more consistent national network. Changes to the Council's responsibilities and makeup also should be considered as efforts are made to move towards more integrated resource management.

The Rx for Fishery Disasters—Regional Plans?

Sadly, New England has been the site of a very difficult transitional process starting with the closure and fishery disaster declaration. I look back on the ways we have tried to help our fishing communities get through this trying time, and now that we have another crisis, I wonder if we could have done it better.

Penny Dalton has worked through this issue both on the Committee and in the agency, and Dr. Hogarth is now struggling with this issue. We have learned a lot over the past 6 years. Since we are rethinking how we do business I'd like your thoughts.

Question. How can we best streamline federal assistance when a "disaster" is declared?

What must be included for communities to successfully transition?

What are the top 3 barriers to getting there? Can we help break through them?

Does it make sense to call on the Agency and stakeholders to hold meetings over the next few months and draft up a plan for the operation of the New England groundfish fishery for the next 3–5 years?

If so, what are the top issues that must be included in such a discussion? (I assume that capacity is #1.)

Answer. Fishery resource failure determinations have covered diverse situations ranging from the Long Island lobster die-off, to hurricanes in the Southeast, to the collapse of groundfish fisheries on both coasts. Because of this diversity, the first step in the process must be to clearly define the rationale for the determination and identify needed assistance for dealing with it.

While there was no disaster determination involved, the rationalization of the Bering Sea groundfish fishery under the American Fisheries Act was probably the most successful transition in recent years. It would be useful to evaluate that transition to identify transferable strategies for other fisheries. Among the key elements were a substantial government and industry funded vessel buyout program and allocation of catches through the establishment of fishery cooperatives.

It does make sense to develop a plan for the New England groundfish fishery to guide transition to a more sustainable fishery. One of the first activities after the initial disaster determination in New England was initiation of a "visioning" process within New England fishing communities to discuss priorities and try to reach consensus on common goals for what the fisheries would look like when they were rebuilt. While this process generated a lot of good discussion, most communities did not complete a long-term recovery plan that could have been useful in addressing this most recent crisis. Dealing with overcapitalization, latent capacity and impacts on fishing communities are top issues that must be included in such a discussion. While conservation requirements must be dealt with in the fishery management plan, transition planning also should consider the implications of management options to address all Magnuson-Stevens Act requirements, including identification of essential fish habitat, reduction of bycatch and reducing fishing impacts on habitat.

Coordinating Marine Statutes

At the hearing, you and Ms. Iudicello both discussed the need for coordination or integration of statutes governing management of living marine resources.

Question. Do you think Dr. Hogarth's plan fully achieves this goal?

If not, what can we reasonably expect from the plan, and by when?

What additional actions and processes will be required to achieve integration in the long-term?

Who should be involved in these efforts?

Answer. Last year, Dr. Hogarth initiated the NMFS Regulatory Streamlining Project (RSP) with the goal of improving the efficiency and effectiveness of NMFS operations and increasing compliance with all procedural requirements. The project builds on a number of agency-sponsored evaluation efforts including two that were initiated during my tenure with NMFS, the Kammer Report and the Integration Project. When fully implemented, the RSP will reduce significantly the number of levels of internal review, delegate signature authority for many actions from NOAA to NMFS and within NMFS to the regions, strengthen and standardize NEPA compliance, and provide staff training. These are all actions that should improve accountability within NMFS and reduce the agency's vulnerability to legal challenges. The RSP also should result in substantial improvements in the coordination and integration of living marine resource statutes for which NMFS has responsibility.

Although the changes proposed by the RSP are long overdue and badly needed, the plan by itself will not fully achieve the goals outlined by Ms. Iudicello and myself in our testimony. NMFS is the federal agency with primary responsibility for stewardship of this nation's living marine resources. However, that mission and legislative authority overlap with those of other federal and state agencies and international organizations, and the interagency boundaries are often far from clear. The Department of the Interior, the Environmental Protection Agency, the Army Corps of Engineers, and international fishery commissions all have statutory mandates for programs that directly affect living marine resources. Even within NOAA, the National Ocean Service has responsibility for coastal zone management and marine sanctuaries and the National Sea Grant College Program carries out important research, outreach and education activities. A stepwise approach could be used to resolve this broader issue, building on the RSP and extending it first within NOAA and then to other agencies. This effort should be coupled with the priority setting and strategy development process outlined in the response to previous questions.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON OLYMPIA J. SNOWE
TO PENELOPE DALTON

Question 1. We are currently caught in an endless cycle of litigation-based management. We are experiencing poor management decisions leading to litigation which leads to still more poor management decisions. More often than not, when NMFS loses a lawsuit it is our fisherman that suffer the consequences. Given your experience with the Senate, NMFS, and CORE, how do you think we can break this cycle of litigation-based management? What steps should NMFS be taking both in the short term and over the long term? What internal NMFS processes could be improved to end this endless litigation?

Answer. As I stated previously, there is neither a single cause nor an easy solution to the upsurge in litigation over the past five years. The recent analysis by the National Academy of Public Administration (NAPA) indicates that NMFS has been challenged in the courts under at least six statutes and the total number of challenges has risen from an average of 1 or 2 each year to a high of 26 in 2001. While much of the rise has been blamed on enactment of the Sustainable Fisheries Act, a larger proportion of the new cases has resulted from challenges under the National Environmental Policy Act, the Endangered Species Act and the Regulatory Flexibility Act.

I believe that the key to these trends and to reversing them lie in the agency's win-loss record. Before 1994, the government lost very few cases. More recently, however, its success rate has dropped substantially and in the last four years NMFS has lost more cases than it has won. Put simply, the best way for the agency to deal with lawsuits is to standardize its procedures and ensure that it is in compliance with the law. For this reason, the focus of recent NMFS efforts has been to identify the problems that give rise to litigation vulnerabilities and to take steps to correct them. This approach has suggested programmatic areas where additional resources are necessary, such as the need to improve the collection and analysis of social and economic information relating to the marine activities NMFS regulates. It also has led to immediate results in a few areas. For example, the NAPA report points out that NMFS has strengthened its analyses under the Regulatory Flexibility Act and prevailed in every challenge under that law in 2000 and 2001.

Taking this approach, Dr. Hogarth has initiated the NMFS Regulatory Streamlining Project (RSP) to improve the efficiency and effectiveness of NMFS operations and increase compliance with all procedural requirements. The project builds on a number of agency-sponsored evaluation efforts including two that were initiated while I was at NMFS, the Kammer Report and the Integration Project. The RSP offers real promise for strengthening agency compliance with all the statutes for which it has responsibility and putting litigation on a downward trend.

Question 2. Over the past couple of years we have repeatedly seen NMFS make errors which could have been identified during a review and easily corrected. These mistakes range from typographical errors to major flaws which should have been highlighted. Unfortunately, these errors are made even after several levels of review and inherently lead to litigation. In all, this indicates inherent flaws in the NMFS review process and suggests that we need to find ways to make NMFS and its personnel more accountable. Having seen this process first-hand, how do you think we can better hold NMFS personnel accountable? Are additional levels of review needed? How would this work?

Answer. The way to improve accountability within the regulatory process is not to add additional layers of review, but rather to reduce them. All too often during my tenure with NMFS, I received memos, decision documents, and Congressional responses that had serious problems in content and even with grammar. A tracking sheet usually accompanied the document and was filled with signatures from agency personnel who had reviewed it from various perspectives. After I added my signature, the document frequently underwent additional layers of review in NOAA headquarters, the Secretary's Office and the Office of Management and Budget. From this experience I concluded that when everyone reviews a document, no one really reads it. Individual accountability is lost in a cumbersome and endless clearance process. One of the objectives of the RSP is to ensure that agency documents are reviewed comprehensively but not unnecessarily.

August 1, 2002

Hon. ERNEST F. HOLLINGS,
Chairman,
Senate Committee on Commerce, Science Transportation,
Washington, DC.

Hon. OLYMPIA J. SNOWE,
Ranking Member,
Senate Subcommittee on Oceans & Atmosphere, & Fisheries,
Washington, DC.

Dear Senators Hollings & Snowe:

Thank you for the opportunity to testify on May 9 2002 regarding the management of the National Marine Fisheries Service (NMFS) as well as this opportunity to respond to follow-up questions. The future role of the NMFS in conserving and managing fishery resources is a critical issue to the members of the National Fisheries Institute (NFI) and we welcome the oversight of the Senate Commerce Committee.

The NMFS has a vital role to play in conserving fishery resources, and in promoting their sustainable use by fishermen and fishing communities. Over time, however, the agency has drifted away from this dual historic mission towards the view that it should be protecting resources from users. This drift, we believe, has been accompanied by the emergence of a confrontational "us vs. them" relationship between the agency and its fishing constituents.

In light of these broader comments, I am pleased to answer the questions posed by Senator Snowe:

As the aquaculture industry develops, it will continue to face challenges like poor genetic diversity, disease outbreaks, and pollution—all of which can threaten recovery efforts of endangered wild Atlantic salmon. Given these interrelated aspects of salmon production, NMFS can have an important role in this industry. One issue that keeps arising is what NMFS' role in aquaculture should be. What does your organization feel NMFS' role in aquaculture should be? How would this compare to the role of the Department of Agriculture? Where should the jurisdictional line be? Is there anything that Congress need to do to better define NMFS' role in aquaculture?

Aquaculture can and should play a vital role in the future production of fish and seafood. Farming fish and seafood is expanding rapidly in many parts of the world and is becoming an increasingly important for the United States market. Experts advise us that within the next few decades, domestic and foreign farming will generate the majority of the U.S. supply of seafood.

Some aquaculture practices do pose environmental risks, particularly in marine and estuarine waters. And abuses have occurred. As farming matures, however, stringent codes of practice and technological advances are addressing environmental concerns. What's critical, in our view, is that the future regulation of marine aquaculture be based upon the best available science and a scientific assessment of both risks and benefits.

In this regard the NOAA has two important roles to play. One role is to foster the development of new food production technologies through research and education. The other role is to ensure that commercial operations do not damage the environment. The USDA should continue to perform these tasks for fresh-water species. NOAA should be responsible for marine species.

There is currently a regulatory vacuum for the development and regulation of open-ocean aquaculture. The NMFS does not have clear authority regarding farming and other agencies claim jurisdiction over some aspect of open-ocean aquaculture, including the Army Corps of Engineers and the Environmental Protection Agency.

Legislation is needed to establish the NMFS as the lead agency with regulatory authority to address issues including the impacts of open-ocean aquaculture on wild stocks and wild fisheries. NMFS also should be directed to create incentives for the development of aquaculture within the EEZ and promote the development of the industry in a sustainable manner.

Finally, the NMFS should be directed to consider using aquaculture technology as an enhancement tool for the recovery and enhancement of wild fish stocks. We encourage the Committee to consult with Ken Leber at the Mote Marine Laboratory at 941-388-4441, part of the Scientific Consortium for Ocean Replenishment and Enhancement (SCORE) about the possible role of aquaculture technology in sustainable fisheries enhancement.

In summary, legislation is needed to establish the NMFS as the lead regulatory authority, establish promotional and developmental programs and incentives, and

further research the role aquaculture technology can play in wild stock enhancement and rebuilding.

Our ability to manage our fisheries stocks is significantly hampered by the amount of bycatch that is often caught in individual fisheries. By catching the wrong fish or catching targeted fish that are too small, we are increasing the mortality for fish that won't even go to market. In a multi-species fishery such as New England groundfish, the bycatch of species such as cod is hurting our rebuilding efforts. How can we improve these efforts to reduce bycatch? In what ways can we encourage fishermen and scientists to research more and better ways to reduce bycatch? What incentives can we provide fishermen which will help encourage bycatch reductions?

Reducing bycatch and waste requires a productive relationship between NMFS and fishermen. Establishing such a relationship will take time.

For example, the purported bycatch of scup in other Mid-Atlantic fisheries has resulted in the establishment of large Gear Restricted Areas (GRAs). The NFI Scientific Monitoring Committee believes, however, that the bycatch of scup in these areas is inconsequential and has been attempting to engage in cooperative research with the NMFS to study this further. It has taken years for the agency to become willing to work in a cooperative fashion on this issue.

New incentives to cooperate are needed for both officials and fishermen. One way to encourage cooperation is to designate a portion of Saltonstall-Kennedy funds for cooperative research into bycatch reduction. Another is to condition a portion of agency funding upon the establishment of cooperative agreements.

In creating federal fisheries management laws, we must strike a balance between meeting national standards and maintaining regulatory flexibility. This can be become difficult for an issue like capacity reduction. Even though capacity problems may vary among regions, there may be some rationale for having a nationally coordinated and consistent program for reducing excess capacity. How can we address this issue of overcapacity, without overlooking socio-economic effects?

While some argue that overcapacity inherently leads to overfishing, in the presence of a robust conservation and management regime, overcapacity is fundamentally a socio-economic issue. This accounts for the difficulty in defining exactly what is "overcapacity."

The existing authorities under Section 312 of the Magnuson-Stevens Act and the Interjurisdictional Fisheries Act provide adequate policy frameworks to develop and implement capacity reduction programs that are fishery specific. Some policy issues, however, need to be considered further by Congress, including:

Some lament that the removal of latent capacity through a capacity reduction or buy-back program has no real-world effect in the present and that the compensation of individuals for the removal of such capacity is somehow not fair. It is important to remember, however, that the removal of latent capacity does eliminate the threat of future active capacity and that the owner is compensated, perhaps not for present returns on his or her investment, but for the lost future opportunity the latent capacity represents.

Some argue that the costs of buy-back program should be borne by the beneficiaries of the capacity reduction, usually considered to be the remaining participants in the fishery. The willingness of remaining participants to fund buy back programs, however, is contingent upon the perceived future benefits. To the extent that the remaining participants feel that their investment, not only in their own capacity but also in the removal of some of their competitors, will yield a reasonable return, they will be willing to invest. However, if the return on the investment is inconsistent with the cost, their willingness will necessarily evaporate. As a practical matter, therefore, government funding may be needed if buy back programs are to work. Others argue that government incentives created the excess capacity in many U.S. fisheries and that, therefore, government funding should be used to solve the problem it helped create.

Unless some sort of national funding mechanism is established, it is likely that the fishermen in many fisheries will be unable to generate sufficient funding for capacity reduction, and Congress will continue to be asked to fund specific buyback programs.

For these reasons we believe that Congress should allow Saltonstall-Kennedy and Capital Construction Fund resources to be used for capacity reduction. However, appropriated dollars may also be necessary, both in terms of direct funding and the underwriting of federal loans to industry participants.

The race for fish can generate excessive investments in both harvesting and processing capacity. Fish caught quickly need to be processed to enter the marketplace. In these fisheries, one sector cannot exist without the other. The same social and economic chaos that can result from marginally operating harvesting capacity and bankruptcies can result from similar primary processing operations. As Congress

considers rationalizing U.S. fisheries through capacity reduction programs, primary processing capacity needs to be considered.

One way to reduce capitalization is through the assignment of individual fishing quotas (IFQs). Consistent with the statements above, any new IFQ authority should allow for the inclusion of primary processors (both one-pie or two-pie approaches) if the Council determines that it is appropriate.

Once again, thank you for the opportunity to submit these additional comments. Please do not hesitate to contact me should you need additional information.

Sincerely Yours,

RICHARD E. GUTTING, JR.,
PRESIDENT,
National Fisheries Institute.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN F. KERRY
TO DR. WILLIAM T. HOGARTH*

Fisheries Observers

Question. NMFS currently deploys observers to collect fishery dependent data in only 11 of the 230 federal fisheries that it manages under the authority of the MSA. NMFS also has responsibility for monitoring an additional 25 category I and II state and federal fisheries under the MMPA, yet currently only has coverage in 7 of these fisheries. We have long urged the Administration to improve observer coverage, and now increased coverage is being required by court decisions—such as the one in New England.

What is being done to increase this coverage?

Have you identified how much it will cost to provide adequate observer coverage, nationwide?

Will you be able to get the required number of observers out for the New England fishery this season?

Socioeconomic Analysis

Question. From reading the “Kammer Report” and other reviews, we appear to lack the infrastructure necessary to systematically conduct socioeconomic analyses mandated under the Regulatory Flexibility Act and National Standard 8 of the SFA. Each Stock Assessment and Fishery Evaluation (SAFE) report is required to summarize the social and economic condition of the fishery’s recreational, commercial and processing sectors, as well as the most recent biological status of the fishery.

Does NMFS currently perform any social science evaluations at the regional or national scale?

Are Councils better equipped for this?

What is the agency’s current staffing capacity to collect and analyze social and economic information relating to the marine activities NMFS regulates under SFA and RFA?

What plans are there to address this increasing need to employ enough qualified economists, sociologists, and anthropologists?

New England’s Capacity Situation

The District Court Judge in *CLF v. Evans* has issued an order that would substantially reduce effort in the New England Groundfish Fishery. The order’s baseline method for determining the DAS cut is devastating to our inshore fisherman, and I hope that Judge Kessler does reconsider that portion of the order. Beyond that, it is important for us to understand what the order does to the fishery over the coming year.

Effort Reduction by Court Order

Question 1. How much has the Judge’s order decreased effort?

Question 2. Will the Secretary/you recommend institutionalizing the removal of latent permits?

Question 3. Assuming the removal of latent permits is permanent, how much further reduction in effort will be necessary to meet the conservation and capacity requirements of the Magnuson-Stevens Act?

*The witness response to the questions was not available at the time this hearing went to press.

Question 4. Assuming the removal of latent permits *and* 20 percent DAS reduction is permanent, how much further reduction in effort will be necessary to meet the conservation and capacity requirements of the Magnuson-Stevens Act?

Loan Prospects While we need to provide short term emergency assistance to some of our communities, it would also be sensible to embark on long-term planning, through industry-financed voluntary buyouts, so that those who stay in the fishery “pay” for those who want to leave.

Question 5. How would you recommend we proceed along this path in New England? Will the Amendment 13 process suffice, or do we need another venue?

Question 6. Will you work with this Subcommittee on legislation that would provide loan authority for capacity reduction—in this and other fisheries?

Low Frequency Sonar

Question. NMFS is considering a request for a letter of authorization (LOA) that would allow the Navy to incidentally “take” marine mammals, which is expected to result from the Navy’s proposed use of low frequency active sonar (LFA). The intended use of LFA is to detect quiet submarines. NMFS plans to make a final determination on the LOA by mid-May. NMFS received approximately 10,000 comments in response to its notice regarding the Navy proposal, from scientists, environmental groups and others.

I understand that NMFS is poised to make its final determination with respect to the Navy’s proposed use of low frequency active sonar, or “LFA.” However, it is my understanding that when this new technology was tested on marine mammals for potential impacts, it was tested at decibel levels well below what the letter of authorization would allow. Is that correct?

Am I correct that if issued, the authorization to the Navy will include conditions that would prohibit the use of LFA if impacts were more adverse on marine mammals than anticipated?

Flexibility in Decisionmaking

Question. With all this talk of process, it feels like we are going down a path of *less* flexibility in management decisionmaking. The lack of flexibility is incredibly frustrating both to fishermen and—I would assume—to managers. For example, I understand that when stock assessments came back with *better* news than expected for Monkfish, the agency could not issue a rule that would change the 0 harvest default rules in time for the season, and the fishery is now *closed*.

Let me repeat: We have had to *close* a fishery that can have increased harvest! This makes no sense.

Doesn’t the agency have enough discretion to change management measures when the news is good? What is the sticking point?

How can we inject flexibility in this process?

How can we expect to meet procedural requirements like NEPA and still make quick decisions that respond to new information?

Question I understand from your comments that you are working through a process to open this fishery in an expedited fashion.

How long will this process take?

The RX for Fishery Disasters—Regional Plans?

Question. Sadly, New England has been the site of a very difficult transitional process starting with the closure and fishery disaster declaration. I look back on the ways we have tried to help our fishing communities get through this trying time, and now that have another crisis, I wonder if we could have done it better.

Penny Dalton has worked through this issue both on the Committee and in the agency, and Dr. Hogarth is now struggling with this issue. We have learned a lot over the past 6 years. Since we are rethinking how we do business I’d like your thoughts.

How can we best streamline federal assistance when a “disaster” is declared? What must be included for communities to successfully transition?

What are the top 3 barriers to getting there? Can we help break through them?

Does it make sense to call on the Agency and stakeholders to hold meetings over the next few months and draft up a plan for the operation of the New England groundfish fishery for the next 3–5 years?

If so, what are the top issues that must be included in such a discussion?

I assume capacity is #1.

Innovative Techniques

Question. Mr. Benton outlined some impressive accomplishments in the Alaska groundfish fishery that seem to be entirely appropriate for use in all parts of the country—including New England. I am particularly impressed by the bycatch reduction and the independent scientific review process in the North Pacific Council. I also understand that they are also pioneering work in ecosystem management.

What are the barriers to making these techniques work in a fishery like the New England groundfish fishery?

How close are we to getting to multispecies management in the North Pacific?

Would it be beneficial to get the North Pacific Council together with our New England Council to discuss strategies that might be transferrable?

What would you propose to move us along this path?

The Future of U.S. Fisheries

Question. Some suggest that an agency straining to meet legal mandates, respond to litigation and implement administrative changes, is not in the best position to take a long, critical look at needed reforms over the next 5 to 10 years.

Do we know what the goals of U.S. fisheries are over the next 10–25 years? Is there a plan in place to develop or pursue long-term goals for fisheries and reconcile some of the difficulties created by the multiple statutes?

Tools Needed to Improve Compliance

Question. Ms. Iudicello states that the existing compliance system isn't always well implemented. She also concludes that while the system does not need to be changed, we do need to change the tools and resources we provide to NMFS and the Councils.

Do you agree?

What are the tools and resources you see as being essential to this task?

Given the current litigation burden, is this possible?

Do you see statutory changes being needed to accomplish this?

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE
TO DR. WILLIAM T. HOGARTH*

Pacific Islands Region

The State of Hawaii is blessed with an abundance of ocean and marine resources. Situated in the middle of the largest body of water on the planet, the state and its people are uniquely poised to serve as stewards, managers, and custodians of these natural treasures. Regrettably, these efforts have been hampered by a lack of support from the Federal Government, and in particular, from the National Marine Fisheries Service (NMFS). A few years ago, NMFS recognized the deficiencies and considered two strategies: either creating a new region for the Pacific, or opening an Pacific Island Area Office (PIAO), that would operate like a satellite to the NMFS Southwestern region. At that time, NMFS opted to establish the PIAO in the hopes that such a satellite would provide the federal support necessary for Hawaii's stewardship role.

Since that time, however, it has become clear that the satellite office strategy has proven insufficient to address the large number of issues arising in the Pacific, and I am very pleased that the NMFS has agreed with this assessment, and is supportive of the formation of a new Pacific Islands Region.

Question 1. Please discuss your vision of the new Pacific Islands Region (PIR). Will it be a full, robust NMFS region with real decision-making authority and ample funding to address the myriad issues arising in the Pacific ocean, or will it merely be a re-named PIAO with neither funding nor authority to address Pacific issues.

Question 2. Please discuss your vision of how science and resource management will be integrated in the new PIR. Will the NMFS laboratory be collocated with the PIR's offices? What steps will be taken to ensure that the research conducted by NMFS scientists will directly tie in to current resource management issues? How

*The witness response to the questions was not available at the time this hearing went to press.

will NMFS scientists partner with other researchers from NOAA, the University of Hawaii, the Oceanic Institute, and other institutions in order to pool resources and more effectively complement one another's efforts.

Question 3. The current FY02 spending plan for the PIR transition funds that the Congress appropriated contains \$100,000 for "PIR Science Center Costs." Please describe in detail what these costs are, and why they are being paid from the PIR transition funds.

Question 4. What is your time frame for implementing the PIR?

Question 5. The PIR FY02 spending plan calls for \$50,000 for new permanent hires, and mentions that \$400,000 will be needed in FY03. Please describe in detail the new permanent hires that will be made.

Question 6. The PIR FY02 spending plan calls for \$50,000 for "Transition Manager Costs." Please describe in detail what costs will be incurred by the Transition Manager, and explain why they are appropriately taken from the PIR transition funds.

Question 7. Generally, the PIR FY02 spending plan calls for the expenditure of funds for different kinds of enhancements to both material resources and personnel. Please share with me the underlying analysis that led the NMFS to its conclusions as to the specific dollar needs in these specific areas. For example, was there a study or needs assessment conducted? If so, please share these results with me.

Northwest Hawaiian Island Sanctuary Designation

Question 1. Detail the NMFS' specific role in working with the National Ocean Service regarding the Sanctuary designation process.

Question 2. Please outline in detail the research and data gathering and analysis that you feel must be completed as part of the designation process, prior to the identification of a preferred alternative. For each level of the outline, please also estimate the cost of the individual research and analysis items.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RON WYDEN TO DR. WILLIAM T. HOGARTH*

Question 1. BUYBACKS

As we have discussed, my legislation to get a buyback program going on the West Coast has not been embraced by this administration. I asked Vice Admiral Lautenbacher last week about this, and he suggested that my proposal along with other possibilities for capacity reduction is being looked at.

In addition to my buyback bill, what other actions is NMFS considering to address long-term capacity reduction?

Question 2. BUYBACK FOLLOW UP:

The buyback bill is a homegrown initiative.

Do your other ideas have the support of affected fishers?

Question 3. SLOW RELEASE OF DISASTER FUNDS

Another issue that seems to come up every year is the slow pace with which NMFS and NOAA release disaster funds. Again this year, the funds, which I fought to secure for fishers and fishing families, are not getting to the recipients within a reasonable time frame. I am certain that you will hear about this during your visit to Oregon.

You know that my legislation seeks to address this bureaucratic black hole, and I would like you to comment on what NMFS is doing to remedy this situation.

Question 4. BETTER STOCK ASSESSMENTS

Stock assessments and fisheries research in general are an important part of the management process. And the cooperative research program is something that fishers have been very supportive of. But, without good, solid information, decision-making becomes a game of pin-the-tail-on-the-donkey. And it's the fishers and fishing communities that end up feeling like the donkey.

It's my understanding that stock assessments are conducted yearly in just about every fishery except the West Coast groundfish fishery, where they occur only every three years. You know that I have argued for yearly stock assessments for some time. Can you assure me that NMFS will begin this year to conduct annual stock

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assessments for West Coast groundfish, and if not, why? What are your concrete plans for further improving how we collect and use the data to make management decisions?

Question 5. BYCATCH

I received a letter from Vice Admiral Lautenbacher recently that addressed some of the steps that NOAA and NMFS are taking to address bycatch in our fisheries. In his letter, Vice Admiral Lautenbacher mentions that you, Dr. Hogarth, are working on an implementation plan to address bycatch, which will be an update to NMFS' 1998 report.

Now that the courts have ruled against NMFS on the protection of Pacific bottom fish, what changes is NMFS planning to address the bycatch issue?

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MAX CLELAND
TO DR. WILLIAM T. HOGARTH*

Questions.

I have been informed by Georgia officials that the trawl fisheries have been closely monitored for stray turtle catches, and I support this monitoring. However, also off the coast of Georgia, I have heard from officials that shark drift gillnet fisheries in Georgia waters, at the height of the season this year, operated unmonitored. Why have steps not been taken to protect sea turtles from shark drift gillnet fishery at a time when Georgia has recorded high sea turtle mortality rates? Is there a reason that the prohibition was not evenly applied to both the trawl fisheries as well as the shark drift gillnet fisheries?

What measures are you taking to ensure that prohibitions are applied across the board?

Do you have records of any of the shark drift gillnet fisheries been documented to take sea turtles in recent months?

Do you have plans to buy out any shark drift gillnet fisheries operating in north Florida?

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE
TO DR. WILLIAM T. HOGARTH*

Question 1. The Administration has requested a total of \$741 million for NMFS in its FY03 proposal, compared with \$796.7 million appropriated for FY02. Are there any specific programs that you think may be under-funded? If NMFS was authorized additional funding, what are the programs that NMFS would channel the money to? NMFS' operational budget has shifted more toward management and away from research over the past few years. What has been the effect of this? Should we be putting more emphasis on research or management? What do you think is the appropriate balance?

Question 2. The New England groundfish litigation recently concluded with a decision handed down from Judge Kessler. I was pleased to see that this decision was largely based on an agreement that most of the parties—including NMFS—reached, but I'm concerned about how the additional provisions added by the judge may affect fishermen and fishing communities. What are the specific socio-economic impacts on fishermen and communities that NMFS is anticipating from this decision? Considering the impacts on fish and fishermen, what are NMFS' short and long term plans for moving forward in this region? How will NMFS change how they work in this post-litigation fishery?

Question 3. In 2000, Ray Kammer of NIST released the report, "An Independent Assessment of the Resource Requirements for the National Marine Fisheries Service." This report made a number of recommendations for improving NMFS' management. Which of these recommendations does NMFS intend to implement? What is limiting NMFS' ability to further implement some of these recommendations? Do you plan to review the findings of the report and document your actions in response to it?

Question 4. Time after time we see poor communication within NMFS leading to poor information being passed to our fishermen and other agencies. When the regu-

*The witness response to the questions was not available at the time this hearing went to press.

lations for the new fishing season were changed to comply with the ruling in the New England Groundfish litigation, NMFS offices were releasing conflicting guidance. On April 19th, the Office of Enforcement told the Coast Guard that all vessels with nets sizes not complying with the new regulations were to return to port. That same day the NMFS Northeast Region sent a letter out to all permit holders detailing the new regulations and informing draggers that as long as they left before May 1st they could continue to fish with the smaller mesh net for the duration of the trip. Unfortunately for several fishermen, on May 1st the Coast Guard used the guidance it had been given by NMFS Office of Enforcement and sent them back to port for not meeting the new regulations. This internal miscommunication led to upset fishermen who eventually lost valuable days at sea never mind the investment they made in the trip. Unfortunately miscommunications like this are all too common. How can get NMFS to better communicate within its own agency? Is this an agency culture problem? Is it a technology problem? Is this an issue of how NMFS is structured?

Question 5. Over the past couple of years we have repeatedly seen NMFS make errors that should have been identified during a review and easily corrected. These mistakes range from typographical errors to major flaws which should have highlighted. Unfortunately, these errors are made even after many levels of review and inherently lead to litigation. In all, this indicates inherent flaws in the NMFS review process and suggests that we need to find ways to make NMFS and its personnel more accountable. How can we better hold NMFS personnel accountable and ensure that these errors are not made in the first place?

Question 6. One of the Kammer report's recommendations was to increase the resources devoted to towards providing better quality socio-economic analysis to address requirements such as the Regulatory Flexibility Act and National Standard 8 of the Sustainable Fisheries Act. The Kammer report recommended an increase in socio-economic analysis funding by \$10 million. When we look at the Administration's Fiscal Year 2003 budget proposal we see a total of \$4 million recommended for socio-economic analysis which is only an increase of \$1.5 million over the previous year. While NMFS acknowledges that socio-economics is important, it has yet to demonstrate that socio-economics is a top NMFS priority, particularly when it comes to funding. Exactly where does socio-economics fit into NMFS' list of priorities? What specific steps has NMFS taken to improve its understanding and analysis of socio-economic systems? What evidence can you provide of progress in this area? What is NMFS' plan for developing a comprehensive socio-economics program? What additional resources are you directing towards this, both in the short and long term? Do you see this as a temporary or permanent part of NMFS' future?

Question 7. One of my concerns with the recent spate of litigation is that no adequate socio-economic analysis has been conducted in constructing the remedies. While the remedies may be in compliance with other portions of the Magnuson-Steven Act, they may not be in compliance with National Standard 8—thereby possibly prompting more litigation. To what extent was NMFS able to consider socio-economic impacts in constructing its proposed remedies? Do you anticipate any countersuits or appeals from the industry, based on the lack of socio-economic studies required by law? If so, how would this affect the status of fish and the fishery? In many western watersheds, critical fish habitat designations are being repealed because of claims that socio-economic impacts were not considered. This repeal may hurt important conservation efforts in some areas. How can NMFS ensure that all future management decisions that they make will incorporate legally-defensible socio-economic considerations?

Question 8. Another one of the Kammer report's recommendations was to increase the education level and the level of science within the NMFS workforce. The people who work for NMFS work in a very specialized field where corporate knowledge is critical. The report also revealed that the most critical personnel shortages are in the areas of stock assessments and socio-economics. It is not a coincidence that these are the areas where NMFS has its greatest deficiencies. These problems are further exacerbated by the fact that 47 percent of the entire NMFS PhD population is eligible or will soon be eligible for retirement. What is NMFS doing to implement these recommendations and better hire and retain the personnel it needs to carry out its mandates? Funding limitations may also be contributing to this problem. What increases in funding do you need to maintain your workforce? What other obstacles are you facing in improving the caliber of the NMFS workforce?

Question 9. The Kammer Report recommended that NMFS implement a comprehensive stock assessment improvement plan that would enable NMFS to address

its need for better resource information. Better stock assessments will help bring science to the forefront. The report recommended that funding for this effort be increased by \$100 million. What progress has NMFS made in implementing this recommendation? What roadblocks are you facing in improving stock assessments? Are there enough resources devoted to assessments?

Question 10. New Hampshire has successfully petitioned the ASMFC to allow their lobster fishermen to set 1200 traps inshore or offshore under a new licensing scheme that includes an open-access "limited license." This would put the thousand-plus Maine lobstermen at a distinct disadvantage, undermine cooperative efforts, and violate National Standard 4 of the Magnuson-Stevens Act (requiring equal treatment of states under fishing rules). This measure was included in the proposed rule by NMFS. I have expressed to NMFS and the ASMFC our strong concerns about this rule. What is the current status of this rule? What, if anything, has NMFS changed about the content of this rule? What is NMFS' timeline for proceeding on this issue? If NMFS goes forth with this rule, how will it satisfy National Standard 4?

Question 11. Under the Dynamic Area Management system for right whales, NMFS has lowered the threshold to trigger a closure from 5 whales to 3. Considering the ramifications of a closure triggered by sighting, sightings must be accurate and reliable. How does NMFS justify that 3 is the appropriate number of whales to trigger a closure? Who qualifies as an observer? What kind of training do they undergo? A DAM closure has already been implemented in New England waters this year, which requires fishermen to temporarily remove all fishing gear. Gear removal can be very dangerous to do in the required 48 hours. I understand that NMFS has stated that gear modification was not a current option for a DAM. Apparently, NMFS has yet to do the necessary paperwork to allow the use of modified gear, even though you can use modified gear within the Seasonal Area Management (SAM) system, where we know the whales are going to be. Does NMFS plan to allow modified gear in DAM areas? What are your plans for proceeding with this? Considering that a DAM is now being implemented, what is your timeline on this?

Question 12. In developing the SAM system, NMFS issued an advanced notice of proposed rulemaking dealing with SAMs and solicited comments from the public. The notice also indicated that they would prepare a full environmental impact statement (EIS) that would include an economic analysis of the possible options. Before this could be completed, the court ordered NMFS to implement the SAM system, which went into effect March 1st. I understand that NMFS still sought comment from the public and intends to complete the EIS process. What is the status of the EIS? When will it be completed? What can you tell me about the findings so far? Is there anything that you think may cause NMFS to reopen the rulemaking process and create a new final rule?

Question 13. As the aquaculture industry develops, it will continue to face challenges like poor genetic diversity, disease outbreaks, and pollution—all of which can threaten recovery efforts of endangered wild Atlantic salmon. Given these inter-related aspects of salmon production, NMFS can have an important role in this industry. What role should NMFS have in regulating or managing aquaculture? How is NMFS planning—now and in the long run—to work with this industry?

Question 14. The federal recovery plan outline for endangered wild Atlantic salmon encompasses much of what was included in the Maine Atlantic Salmon Conservation Plan. When completed, the draft recovery plan will be put out for public comment and public hearings are likely. What is the status of the federal plan? What timeline are you looking at? Will you be holding public hearings once a draft is released?

Question 15. I understand you are reviewing both NMFS' regulations and the Magnuson-Stevens Act to determine if changes can be made to either to increase flexibility, and that NMFS will have recommendations for both regulatory and statutory changes after the review is completed this spring. What is the status of this review? What is its timeline for completion? At this time can you give me any indication of what you'll be recommending? What have you determined about our ability to increase flexibility?

Question 16. Cooperative research programs serve the dual purposes of promoting mutual understanding between scientists and fishermen (thereby improving relationships and reducing conflict) and serving programmatic data collection needs. Expanded efforts in both of these areas were recommended in the Kammer report on NMFS. What are NMFS' current and future plans on cooperative programs? It's

clear how cooperative research can help with stock assessments, but what role will these programs play in other areas like gear innovation, vessel monitoring, and socio-economic impact assessments? Where do you see other needs for more cooperative efforts? Do we need a national program for further developing cooperative research?

Question 17. The issues facing one regional council are in many ways different from those faced in other councils. Therefore, in creating federal fisheries management laws, we must strike a balance between meeting national standards and maintaining regional flexibility. This can become difficult for an issue like capacity reduction. Even though capacity problems may vary among regions, there may be some rationale for having a nationally-coordinated and consistent program for reducing excess capacity. How do we strike the balance between national coordination and regional flexibility? Would a nationally coordinated capacity reduction program be effective at reducing some fishing pressures? How should such a program be designed?

